Supreme Court, U.S.
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In The

Supreme Court of the United States

CHARLES M. KRUTSINGER,

Petitioner,

v.

PEOPLE OF THE STATE OF COLORADO,

Respondent.

On Petition For A Writ Of Certiorari To The Colorado Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court's prior cases recognize that a criminal defendant has a right under the Sixth and Fourteenth Amendments to present evidence in his defense at trial. However, this Court has not articulated a test for determining when the erroneous exclusion of defense evidence establishes a constitutional violation, such that a constitutional rather than ordinary harmless error standard of review must be used. In the absence of guidance from this Court, the lower courts have developed competing, inconsistent, and sometimes unclear tests.

In this case, both sides agreed that the trial court erred in excluding relevant, admissible evidence offered by the defendant at his criminal trial. Yet, the Colorado Supreme Court declined to treat the stipulated error as constitutional in nature.

Does a trial court's erroneous exclusion of relevant defense evidence violate the defendant's constitutional right to present a defense?

LIST OF PARTIES

The caption lists all parties: the individual petitioner Charles Krutsinger, and the State of Colorado. No corporations are involved in this criminal case.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	2
1. Introduction	2
2. Underlying facts	5
a. General trial evidence	5
b. Evidence the jury did not hear from S.M.'s psychologist Patricia Howard	9
c. Other trial proceedings	10
3. First intermediate appeal	11
4. Remand hearing in trial court	12
5. Second intermediate appeal	13
6. Colorado Supreme Court	14
REASONS TO GRANT THE PETITION	15
I. This Court has not established a standard for determining when the erroneous exclusion of defense evidence violates the constitutional right to present a defense	15

TABLE OF CONTENTS – Continued

Page

II. In the absence of a clear standard, lower courts have employed contradictory and inconsistent means of determining when a constitutional violation occurs 18

A. The importation of a materiality requirement..... 18

1. Description of "materiality" in this Court's access-to-evidence cases..... 18

2. The lower courts have imported a materiality requirement into right-to-present-a-defense cases..... 21

B. Relevance should be the proper test for a constitutional violation 25

III. The Colorado Supreme Court erred in requiring a greater showing than relevance in order to establish a constitutional violation..... 30

CONCLUSION..... 34

APPENDIX

Krutsinger v. People, 219 P.3d 1054 (Colo. 2009).....App. 1

People v. Krutsinger, No. 06CA0532 (Colo.App. April 10, 2008) (unpublished written opinion).....App. 27

TABLE OF CONTENTS – Continued

Page

People v. Krutsinger, No. 02CR674
(Colo.Distr.Ct. February 23, 2006)
(unpublished written decision) ..... App. 44

People v. Krutsinger, 121 P.3d 318
(Colo.App. 2005) ..... App. 55

Colorado Supreme Court Order
Denying Rehearing
(November 23, 2009) ..... App. 72

TABLE OF AUTHORITIES

Page

CASES

Alcala v. Woodford, 334 F.3d 862 (9th Cir. 2003) 23

Brady v. Maryland, 373 U.S. 83 (1963) 18, 19, 20

Chambers v. Mississippi, 410 U.S. 284 (1973) 16

Chapman v. California, 386 U.S. 18 (1967) 3, 29

Crane v. Kentucky, 476 U.S. 683 (1986) ..... *passim*

Crawford v. Washington, 541 U.S. 36 (2004) 18

Daniels v. Lee, 316 F.3d 477 (4th Cir. 2003) 23

DiBenedetto v. Hall, 272 F.3d 1 (1st Cir. 2001) 26

Government of the Virgin Islands v. Mills, 956 F.2d 443 (3rd Cir. 1992) 23

Howard v. Walker, 406 F.3d 114 (2nd Cir. 2005) 21

Kyles v. Whitley, 514 U.S. 419 (1995) 20, 25

Michigan v. Lucas, 500 U.S. 145 (1991) 17

Patton v. Mullin, 425 F.3d 788 (10th Cir. 2005) 24

Pennsylvania v. Ritchie, 480 U.S. 39 (1987) 17, 24, 28

People v. Hudy, 73 N.Y.S.2d 40, 535 N.E.2d 250 (1988) 27

People v. McLaurin, 184 Ill.2d 58, 703 N.E.2d 11 (1998) 23, 24

People v. Steele, 283 Mich.App. 472, 769 N.W.2d 256 (2009) 32

TABLE OF AUTHORITIES – Continued

Page

Pettijohn v. Hall, 599 F.2d 476 (1st Cir. 1979) 26

Potier v. State, 68 S.W.3d 657 (Tex.Crim.App. 2002) 32

Richmond v. Embry, 122 F.3d 866 (10th Cir. 1997) 24

Rock v. Arkansas, 483 U.S. 44 (1987) 17

Selam v. Warm Springs Tribal Correctional Facility, 134 F.3d 948 (9th Cir. 1998) 23

Sharlow v. Israel, 767 F.2d 373 (7th Cir. 1985) 22

Short v. Sirmons, 472 F.3d 1177 (10th Cir. 2006) 24

State v. Carlos, 17 P.3d 118 (Ariz.App. 2001) 26

State v. Diaz, 100 Hawai'i 210, 58 P.3d 1257 (2002) 27

State v. Kerchusky, 138 Idaho 671, 67 P.3d 1283 (IdahoCt.App. 2003) 21

State v. Moesle, 181 OhioApp.3d 696, 910 N.E.2d 531 (2009) 27

State v. Pulizzano, 155 Wis.2d 633, 456 N.W.2d 325 (1990) 27

State v. Rideout, 182 Vt. 113, 933 A.2d 706 (2007) 23

State v. Schreuder, 712 P.2d 264 (Utah 1985) 23

State v. Tran, 743 So.2d 1275 (La.App. 1999) 28

Taylor v. Illinois, 484 U.S. 400 (1988) 29

TABLE OF AUTHORITIES – Continued

Page

Taylor v. Singletary, 122 F.3d 1390 (11th Cir. 1997) 23

Telum, Inc. v. E.F. Hutton, 859 F.2d 835 (10th Cir. 1988) 16

United States v. Agurs, 427 U.S. 97 (1976) ..... *passim*

United States v. Bagley, 473 U.S. 667 (1985) ..... *passim*

United States v. Bailey, 834 F.2d 218 (1st Cir. 1987) 25, 26

United States v. Blackwell, 459 F.3d 739 (6th Cir. 2006) 21

United States v. Collins, 551 F.3d 914 (9th Cir. 2009) 24

United States v. Holmes, 413 F.3d 770 (8th Cir. 2005) 26, 27, 32

United States v. Ladoucer, 573 F.3d 628 (8th Cir. 2009) 27

United States v. Nixon, 418 U.S. 683 (1974) 28

United States v. Redd, 355 F.3d 866 (5th Cir. 2003) 23

United States v. Scheffer, 523 U.S. 303 (1998) 17

United States v. Tanner, 941 F.2d 574 (7th Cir. 1991) 22

United States v. Turning Bear, 357 F.3d 730 (8th Cir. 2004) 27

United States v. Valenzuela-Bernal, 458 U.S. 858 (1982) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

United States v. Williamson, 202 F.3d 974 (7th Cir. 2000) 22

Wade v. Mantello, 333 F.3d 51 (2nd Cir. 2003) 21

Washington v. Texas, 388 U.S. 14 (1967) ..... *passim*

CONSTITUTIONAL PROVISIONS

U.S. Const. Sixth Amendment (including Compulsory Process) ..... *passim*

U.S. Const. Fourteenth Amendment (Due Process) ..... *passim*

STATUTES

Colo.Rev.Stat. §19-3-304 8

28 U.S.C. §1257(a) 2

RULES

Fed.R.Evid. 401 ..... 16, 28

United States Supreme Court Rule 13.1 1

United States Supreme Court Rule 13.3 1

TREATISES

McCormick on Evidence, §185 (2006) 16

OPINIONS BELOW

1. *Krutsinger v. People*, 219 P.3d 1054 (Colo. 2009) (published opinion in the attached appendix at pages App. 1 to App. 26).

2. *People v. Krutsinger*, No. 06CA0532 (Colo.App. April 10, 2008) (unpublished written opinion). App. 27-43.

3. *People v. Krutsinger*, No. 02CR674 (Colo.Distr.Ct. February 23, 2006) (unpublished written decision). App. 44-54.

4. *People v. Krutsinger*, 121 P.3d 318 (Colo.App. 2005) (published opinion). App. 55-71.

JURISDICTION

The Colorado Supreme Court issued its decision on October 13, 2009. Petitioner Charles Krutsinger timely moved for an extension of time to file a petition for rehearing in the Colorado Supreme Court. The court granted the motion. Krutsinger filed a petition for rehearing within the extended timeframe.

On November 23, 2009, the Colorado Supreme Court issued an order denying Krutsinger's rehearing petition. App. 72. This petition is filed within 90 days of November 23, 2009. Therefore this petition is timely under United States Supreme Court Rules 13.1 and 13.3.

This Court has jurisdiction under 28 U.S.C. §1257(a). Krutsinger contends that the Colorado Supreme Court's decision violated his rights under the Sixth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS

In pertinent part, the Sixth Amendment to the United States Constitution says: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor,. . . ."

In pertinent part, Section 1 of the Fourteenth Amendment to the United States Constitution says that no State shall "deprive any person of . . . liberty . . . without due process of law. . . ."

STATEMENT OF THE CASE

1. Introduction.

This Court's prior cases establish that a criminal defendant has a constitutional right to present a complete defense at trial. However, the Court has not articulated a test for the lower courts to use to determine when the erroneous exclusion of relevant (and otherwise admissible) defense evidence at trial

violates the federal constitutional right to present a defense.[1]

A test is needed because different standards of review apply for constitutional error than for non-constitutional error. If error in excluding defense evidence at trial violates a defendant's constitutional right to present a defense, then the error is reviewed on appeal under the constitutional harmless error standard set forth in *Chapman v. California*, 386 U.S. 18 (1967). If error in excluding defense evidence at trial does not violate the constitutional right to present a defense, then the error is reviewed under a standard that is less favorable to the defendant and more likely to result in a conclusion that the error was harmless.

Due to the absence of guidance from this Court about when the erroneous exclusion of defense evidence violates the constitutional right to present a complete defense, the law in this area has become muddled. Some lower appellate courts hold that the exclusion of relevant defense evidence necessarily triggers a constitutional violation of the right to present a defense. A second group of appellate courts holds that, before a constitutional violation will be found to exist, the defendant must demonstrate that the evidence was "material" as well as relevant. The

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[1] This petition only discusses evidence that is relevant, and also otherwise admissible, under the governing rules of evidence.

courts in this second group employ varying, and inconsistent, definitions of materiality. A third group of appellate courts, including the Colorado Supreme Court here, has adopted a standard that finds a constitutional violation only where a defendant has been entirely prevented from asserting a defense. This approach is amorphous; it will lead to arbitrary and inconsistent results because it requires judges to engage in ad hoc assessments of how much defense evidence may be excluded before the constitutional right is violated.

As a result of the different approaches just described, significant confusion exists in the lower courts about when the erroneous exclusion of defense evidence at trial violates a criminal defendant's constitutional right to present a complete defense. This petition asks the Court to grant review to resolve the confusion, by articulating an appropriate test. This case presents an ideal opportunity to formulate the test, because both parties and the lower appellate courts have agreed that the particular trial evidence excluded here was relevant. Both parties and the lower appellate courts also have agreed that the trial court erred by excluding the evidence. Thus, the appeal presents the single question of what test should be adopted to determine if the acknowledged error is constitutional error.

2. Underlying facts.

a. General trial evidence.

Krutsinger, now 48 years old, is a former Air Force captain with an electrical engineering college degree and no criminal record besides this case. In 1992 he married a woman ("the mother") who had a six-year-old daughter from the mother's prior marriage. This petition refers to the daughter by her initials, S.M.[2]

Krutsinger's marriage with the mother was marred by spousal arguments that sometimes became physical. When S.M. was middle-school-aged, the police intervened during one physical argument that occurred between the mother and Krutsinger. The police arrested the mother and charged her with domestic violence. S.M. believed that Krutsinger had been the aggressor rather than the mother, and that the police had unfairly blamed the mother. S.M. feared and disliked Krutsinger due to his altercations with the mother.

While S.M. was in elementary school, she periodically told her mother that she had a secret, but she would not divulge it. The mother always asked S.M. if inappropriate touching was involved. S.M. always said no.

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[2] S.M. was 16, and therefore a minor, when she made the allegations that gave rise to this case. Under Colorado law, a minor's full name cannot be used in a publicly-filed document.

In high school, S.M. exhibited behavioral problems. The mother discovered that S.M. was smoking marijuana, and also drinking alcohol to intoxication. S.M.'s grades slipped during high school. Krutsinger began to correspond with S.M.'s teachers by email. S.M. hated those emails.

At one point while S.M. was in high school, S.M. and the mother got into a heated argument. The mother said that she did not love S.M. anymore, and that S.M. should go live with her biological father. The argument greatly upset S.M., and made her wonder if the mother truly loved her.

One night in the late summer of 2002 (also while S.M. was in high-school), S.M. got into trouble with her mother because she stayed out late without permission. In an ensuing conversation with the mother, S.M. said that the secret she had never told during elementary school was that Krutsinger had molested her when she was elementary school-aged. The mother relayed the accusation to Krutsinger. He was astonished; he expressed denial and disbelief. He said that S.M. needed counseling. The mother agreed. Later the mother arranged for S.M. to see a psychologist. As described below, S.M. first saw the psychologist, Dr. Patricia Howard, on October 31, 2002.

In early November 2002, S.M. wrote the mother a note concerning the details of the alleged abuse. The next day, S.M. spoke to a school guidance counselor about the alleged abuse. S.M. alleged that, between

her first and sixth grade school years, Krutsinger had "humped" her and also placed her hand on his penis inside his pants. She repeated these accusations to a police officer, indicating that the alleged abuse began towards the end of first grade or the start of second grade, and ended when she was in the sixth grade. S.M. also told the police officer that, when she was in elementary school, she told a friend named J.S. about the alleged abuse. J.S. testified at trial, but she recalled no such disclosure by S.M.

At trial S.M. testified that all the alleged abuse occurred when the family lived in a house on Bexley Street in Highlands Ranch, Colorado. The family had moved from Texas to the Bexley Street house shortly before S.M. began her second grade year in school. The family moved out of that house during S.M.'s sixth grade year in school. S.M. testified that there was no abuse in the new house. She told the jury that the reason the alleged abuse stopped was because she could lock the door of her bedroom in the new house, whereas her bedroom door in the Bexley Street house had not borne a lock.

Defendant attempted to impeach S.M.'s testimony with statements that S.M. had made to her psychologist Patricia Howard. Before trial, the mother had signed a release for Krutsinger's lawyer to obtain information from Howard. Defense counsel had used the release to obtain information from Howard, including Howard's October 31, 2002 session notes with S.M. Defense counsel had personal

possession of the notes when he cross-examined S.M. at trial.

On cross-examination, defense counsel asked S.M. if she had told Howard that the abuse stopped in fourth grade, rather than in the sixth grade as S.M. had testified on direct examination. S.M. answered that she always had said sixth grade. Counsel showed Howard's notes to S.M., but S.M. gave the same answer. The jury did not see the notes, which stated that S.M. had told Howard that the abuse stopped in fourth grade.

Howard's session notes also stated that S.M. was not certain that Krutsinger was the person who had molested her; the abuser might have been someone else. Defense counsel confronted S.M. with that statement too. S.M. responded that, in actuality, she had been certain that Krutsinger was the abuser. S.M. claimed that she was not honest with Howard on that point because Howard had warned her that an allegation of abuse would have to be reported to the police if S.M. positively identified her abuser, but that no report would need to be made if S.M. did not make a positive identification. (Under Colorado Revised Statutes §19-3-304, a psychologist must "immediately" report to law enforcement whenever the psychologist "has reasonable cause to know or suspect that a child has been subjected to abuse." The statute does not require that the child be sure about the identity of the abuser.)

b. Evidence the jury did not hear from S.M.'s psychologist Patricia Howard.

After the close of the prosecution's case-in-chief, and outside the jury's presence, defense counsel brought Howard before the trial court and asked to have her testify before the jury. The prosecutor agreed that Howard should be allowed to testify in order "to impeach actual statements" that S.M. had made to Howard but which S.M. had denied under cross-examination. The trial court would not let Howard testify at all. The court believed that Howard's testimony was barred by Colorado's law of psychologist-patient privilege. Defense counsel made an offer of proof (which included submission of Howard's October 31 notes) and also argued that the privilege had been waived because of the pre-trial release and S.M.'s answers during cross-examination. The court adhered to its decision to exclude Howard. The jury did not hear from, or even see, Howard. Howard's notes were not provided to the jury.

As submitted for the appellate record, in part Howard's notes showed that S.M. told Howard:

1. She disliked Krutsinger because he had physically abused her mother.

2. She doubted her mother's love. She emotionally described to Howard the argument where the mother had told her to go live with her biological father because the mother did not love her any more.

3. She said that she had been molested when she was younger. She believed, but was not certain, that Krutsinger was the person who had molested her. She thought the abuse began when she was four or five years old.

4. She thought the abuse stopped when she was in fourth grade.

The first two of the above-numbered points demonstrated that S.M. had a motive to make a false report against Krutsinger. The third point would have impeached S.M.'s trial testimony about the start date of the alleged abuse. Under this version of events, the alleged abuse would have begun in a different state (Texas rather than Colorado), and would have begun before S.M. was old enough to attend elementary school, rather than in second grade as she indicated at trial. The fourth point would have impeached S.M.'s trial testimony about the end date of the alleged abuse. This point also would have contradicted S.M.'s explanation to the jury about why the abuse ended, because in this version the alleged abuse ended two years before she got a bedroom door with a lock.

c. Other trial proceedings.

Krutsinger testified in his own defense. He denied ever having abused S.M. in any manner. During closing statements the prosecutor told the jury: "So your job essentially is to decide, do you believe [S.M.]? Do you believe her? That's what this

case is about." The jury convicted Krutsinger. The trial court sentenced him to ten years of imprisonment – the lowest sentence allowed by law. Krutsinger has been incarcerated since mid-2003.[3]

3. First intermediate appeal.

On appeal to Colorado's intermediate court of appeals, Krutsinger argued that the trial court had erred in barring Howard's trial testimony, because the psychologist-client privilege had been waived. The prosecution agreed that the privilege had been waived, and therefore also agreed that the trial court should not have excluded Howard. However, the prosecution maintained that Howard's exclusion was harmless error. The court of appeals agreed that the trial court erred when it barred Howard from testifying. App. 57. The court of appeals remanded for the trial court to hear Howard testify and then determine if the error had been harmful. App. 59, 63-64.

Although both parties and the Colorado court of appeals agreed that the excluded evidence was relevant, the court of appeals held that the error in excluding Howard's testimony would violate Krutsinger's constitutional right to present a defense only if Howard's testimony was "material." App. 59. As a matter of first impression in Colorado, the court

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[3] He has always maintained his innocence.

of appeals defined materiality to mean that the excluded evidence "would have created a reasonable doubt that did not exist without that evidence." App. 61. The court of appeals instructed the trial court that if Howard's testimony met the new definition of materiality, then the trial court would determine harmfulness under the constitutional harmless error test. But if the trial court concluded that Howard's excluded testimony did not meet the new definition of materiality, then the trial court would determine harmfulness under the non-constitutional harmless error standard of review. App. 64-65.

4. Remand hearing in trial court.

Howard testified at the remand hearing. She explained that she had four treatment sessions with S.M. between October 31 and November 21, 2002. She authenticated her notes and verified their accuracy. Thus Howard's remand hearing substantiated the four numbered points (listed above) from her October 31 notes.

Also, Howard's testimony at the remand hearing contradicted S.M.'s explanation for why S.M. had failed to definitively identify Krutsinger as the abuser. Howard denied telling S.M. that she (Howard) would not have to report the alleged abuse to law enforcement so long as S.M. did not identify an abuser with certainty. Howard testified that she would not have made such a statement to S.M.,

because doing so would have circumvented Colorado's statutory reporting requirement.[4]

All the post-October 31 sessions between Howard and S.M. occurred after S.M. had publicly accused Krutsinger to the police. In those post-October 31 sessions, Howard saw that the relationship between S.M. and the mother became stronger. During the third session, S.M. told Howard that she now believed that her mother loved her.

After considering Howard's notes and remand hearing testimony, the trial court held that Howard's testimony would not have been material to Krutsinger's jury, under the court of appeals' definition of "materiality." Therefore the court concluded that the acknowledged error in excluding Howard from testifying at the trial did not violate Krutsinger's constitutional rights. The court additionally concluded that the error was harmless under the state law standard for non-constitutional evidentiary error. App. 53.

5. Second intermediate appeal.

On re-appeal, the Colorado court of appeals affirmed the trial court's remand order. The court of

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[4] Howard did not report S.M.'s October 31 abuse allegations to the police because she viewed S.M.'s account as incomplete. (S.M. did not begin to discuss the alleged abuse until near the end of the October 31 session.) S.M. reported to the school guidance counselor before her second session with Howard.

appeals held that the erroneous exclusion of Howard's testimony at trial did not violate Krutsinger's constitutional right to present a defense, because the testimony would not have been "material" under the test set forth in the first intermediate appeal. App. 35-37. The court of appeals also agreed with the trial court that Howard's exclusion from trial was harmless error under the state law standard for non-constitutional error. App. 38-39.

6. Colorado Supreme Court.

The Colorado Supreme Court granted review. In addressing the merits, the court held that the constitutional right to present a complete defense does not require a defendant to demonstrate that the erroneously-excluded evidence was "material." App. 19. Rather, relying on language from this Court's decision in *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), the court explained that the defendant must have "a *meaningful* opportunity to present a complete defense." App. 17 (original emphasis). The court concluded that a defendant has such an opportunity unless he is "denied virtually his only means of effectively testing significant prosecution evidence." App. 22. The court acknowledged that the test was imprecise, but concluded that the acknowledged error in barring Howard from testifying did not violate Krutsinger's constitutional right to present a complete defense. App. 22. The court affirmed Krutsinger's conviction. App. 26.

REASONS TO GRANT THE PETITION

I. This Court has not established a standard for determining when the erroneous exclusion of defense evidence violates the constitutional right to present a defense.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment . . . the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane*, 476 U.S. at 690 (citations and internal quotation marks omitted). The right to present a complete defense includes a defendant's right "to present his own witnesses." *Washington v. Texas*, 388 U.S. 14, 19 (1967).

In several cases, this Court has found that exclusion of defense evidence violated this right, and has described the character of the excluded evidence in various terms. In *Washington*, the Court held that defendant's right to compulsory process was violated because the excluded evidence was "relevant and material to the defense." 388 U.S. at 23.[5] When *Washington* was decided, materiality was an evidentiary concept distinct from relevancy. At that

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[5] The Court also at one point used the term "vital" to describe the evidence, 388 U.S. at 16, but did not repeat this descriptor in stating the holding of the case.

time, "materiality" meant that the matter that the evidence sought to prove was "at issue" in the case. *McCormick on Evidence*, §185 (2006). With the adoption of Fed.R.Evid. 401 in 1973, the evidentiary meaning of materiality was subsumed into the definition of relevance, as the rule requires that the fact to be proven be "of consequence to the determination of the action." *See* Fed. R. Evid. 401, Advisory Committee Notes to 1972 Proposed Rules (comparing "material" under Uniform Rules of Evidence with the phrase "of consequence to the determination of the action" under Rule 401); *Telum, Inc. v. E.F. Hutton*, 859 F.2d 835, 838 (10th Cir. 1988) ("the concept of materiality is now embodied within the broader notion of relevance as defined in the federal rules"). There is no indication in *Washington* that the Court used the term "material" in any sense other than its then-extant evidentiary meaning.

Following *Washington*, this Court held that the exclusion of evidence was a constitutional violation without using the term "material." In *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), the Court found a constitutional violation because evidence "critical" to the defense and "affecting the ascertainment of guilt" was excluded under a state hearsay rule. In *Crane*, the Court determined that constitutional error had occurred where evidence concerning the voluntariness of defendant's confession was excluded. The Court explained that the right to present a defense "would be an empty one if the State were permitted to exclude competent reliable evidence . . . when such

evidence is central to defendant's claim of innocence." 476 U.S. at 690. In *Pennsylvania v. Ritchie*, 480 U.S. 39, 55 (1987), the Court stated, "Our cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt."[6]

The variety of language used by the Court in these cases can be explained by the fact that the Court was simply describing the particular evidence before it, rather than attempting to erect a uniform standard for determining when the erroneous exclusion of defense evidence violates the constitutional right to present a complete defense. Indeed, aside from the *Washington* holding that the exclusion of "relevant and material" evidence is a constitutional violation, the language of the other cases is not susceptible to use as a standard. For example, evidence that "might" influence the outcome of a case is not necessarily "critical" or "central." Moreover,

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[6] In a separate line of cases, this Court has examined when state rules of evidence, even if correctly applied, improperly abridge the right to present a defense. The Court found a violation only when the application of the rule is "arbitrary and disproportionate" to the purposes the rule was designed to serve. *United States v. Scheffer*, 523 U.S. 303, 308 (1998); *Michigan v. Lucas*, 500 U.S. 145, 151 (1991); *Rock v. Arkansas*, 483 U.S. 44, 56 (1987). This line of cases, and the validity of an evidentiary rule, are not at issue here. Both sides and the lower courts agreed that Howard's testimony was erroneously excluded under accepted Colorado evidentiary rules.

terms such as "critical" or "central" are broad and susceptible to subjective interpretation; they do not provide a reasonably definitive guide to the lower courts. *Cf. Crawford v. Washington*, 541 U.S. 36, 63 (2004) (rejecting "reliability" as a test for determining when a Confrontation Clause violation occurs, as it is "an amorphous, if not entirely subjective, concept").

II. In the absence of a clear standard, lower courts have employed contradictory and inconsistent means of determining when a constitutional violation occurs.

A. The importation of a materiality requirement.

1. Description of "materiality" in this Court's access-to-evidence cases.

A number of federal and state courts require that erroneously excluded defense evidence be "material," as well as relevant and otherwise admissible, before a constitutional violation is stated. These courts primarily have imported the materiality requirement from this Court's cases involving governmental interference with access to evidence; thus, a brief review of those cases is necessary in order to understand this line of authority.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Court held that government suppression of exculpatory evidence violates the Due Process Clause when the evidence is "material to either guilt or to

punishment." In *United States v. Agurs*, 427 U.S. 97 (1976), the Court expounded upon this requirement, adopting three different definitions of materiality for application in varying situations. Where the prosecution uses perjured testimony, materiality is shown "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* at 103. If the prosecution fails to disclose favorable evidence following a specific defense request, "implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." *Id.* at 104. Where the government fails to disclose favorable evidence where no request, or only a general request, is made, materiality is shown "if the omitted evidence creates a reasonable doubt that did not otherwise exist. . . ." *Id.* at 112.

In *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), the defendant was unable to present witnesses who had been deported by the government. Finding these circumstances analogous to the *Brady* line of cases that applied to "constitutionally guaranteed access to evidence," the Court held that a constitutional violation occurs only when the evidence lost through deportation is material. *Id.* at 867. The Court, at various points in the opinion, referred to all three of the differing *Agurs* standards as guides to determine materiality, without adopting any of them as definitive. *Valenzuela-Bernal*, 458 U.S. at 868, 873-74, and 874 n.10. The Court emphasized that a materiality requirement was necessary in order to balance

the government's obligation to enforce immigration laws against a defendant's competing right of access to favorable evidence. *Id.* at 872-73. The Court expressly stated that its holding had no application outside of the immigration context: "In adopting this standard, we express no opinion on the showing which a criminal defendant must make in order to obtain compulsory process for securing the attendance at his criminal trial of witnesses within the United States." *Id.* at 873 n.9.[7]

Following *Valenzuela-Bernal*, the materiality requirement of the *Brady* cases underwent further evolution. In *United States v. Bagley*, 473 U.S. 667, 682 (1985), the Court replaced the three *Agurs* standards with a single test: evidence is material, for *Brady* purposes, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Subsequently, in *Kyles v. Whitley*, 514 U.S. 419, 434 (1995), the Court clarified that the *Bagley* standard does not require a showing that the outcome of the trial would have been different: "[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed

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[7] *Valenzuela-Bernal* indicates that the evidence must be "favorable" as well as material. In the instant case, there is no dispute that the excluded evidence was favorable; therefore this part of the constitutional standard is not at issue.

evidence would have resulted ultimately in the defendant's acquittal. . . . The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."

2. The lower courts have imported a materiality requirement into right-to-present-a-defense cases.

Despite the Court's explicit disclaimer in *Valenzuela-Bernal* that the materiality standard is limited to instances where witnesses were deported, many lower courts have adopted the *Valenzuela-Bernal* standard to determine when the erroneous exclusion of defense evidence at trial gives rise to a constitutional violation. In so doing, these courts have employed differing and mutually exclusive definitions of materiality, not only across jurisdictions, but even within some jurisdictions.

The Second and Sixth Circuits, and some states, impose a materiality requirement based upon *Valenzuela-Bernal*, and hold that the requirement is met when the omitted evidence creates a reasonable doubt that did not otherwise exist. *United States v. Blackwell*, 459 F.3d 739, 753 (6th Cir. 2006); *Howard v. Walker*, 406 F.3d 114, 132 (2nd Cir. 2005); *Wade v. Mantello*, 333 F.3d 51, 59 (2nd Cir. 2003); *accord*, *State v. Kerchusky*, 138 Idaho 671, 676, 67 P.3d 1283

(IdahoCt.App. 2003).[8] This test is one of the three *Agurs* standards in existence when *Valenzuela-Bernal* was decided, intended for application only where evidence was withheld but no defense request had been made. These lower courts do not recognize that the *Agurs* standards have been superseded by *Bagley*. These lower courts also provide no principled reason why this particular *Agurs* standard should be chosen over the other two *Agurs* standards.

The Seventh Circuit also requires a showing of materiality, but the Seventh Circuit courts cite to *Washington* rather than *Valenzuela-Bernal* for this proposition. *United States v. Williamson*, 202 F.3d 974, 979 (7th Cir. 2000); *United States v. Tanner*, 941 F.2d 574, 585 (7th Cir. 1991); *Sharlow v. Israel*, 767 F.2d 373, 377-78 (7th Cir. 1985). In *Sharlow*, decided a few weeks after *Bagley*, the court defined materiality using a different *Agurs* standard than that used by the Second and Sixth Circuits. Referring to the standard intended for use when the prosecution introduced perjured evidence, the court in *Sharlow* defined material evidence as evidence which "could have affected the outcome of the trial." 767 F.2d at 378 (internal quotations and citation omitted). The later Seventh Circuit cases continue to refer to a materiality requirement without defining the term.

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[8] The same standard was used by the Colorado Court of Appeals in this case. App. 35, 61.

The Fourth and Fifth Circuits, and some states, likewise impose a materiality requirement (albeit based on the language in *Valenzuela-Bernal* rather than *Washington*), but they do not define the meaning of "materiality." *United States v. Redd*, 355 F.3d 866, 878 (5th Cir. 2003); *Daniels v. Lee*, 316 F.3d 477, 489 (4th Cir. 2003); *accord State v. Rideout*, 182 Vt. 113, 118, 933 A.2d 706 (2007).

In contrast, the Third and Eleventh Circuits, while adopting the materiality requirement of *Valenzuela-Bernal*, recognize that the specific materiality requirements mentioned in that case, and drawn from *Agurs*, have been replaced by the single *Bagley* test. *Taylor v. Singletary*, 122 F.3d 1390, 1394-95 (11th Cir. 1997); *Government of the Virgin Islands v. Mills*, 956 F.2d 443, 446 (3rd Cir. 1992). Under these cases, materiality is shown if exclusion of the evidence undermined confidence in the outcome. Some states similarly rely on variants of the *Bagley* "reasonable probability" test. *See, e.g., People v. McLaurin*, 184 Ill.2d 58, 89, 703 N.E.2d 11 (1998); *State v. Schreuder*, 712 P.2d 264, 275 (Utah 1985).

The Ninth Circuit, like the Seventh Circuit, relies on *Washington* rather than *Valenzuela-Bernal* for the constitutional violation test, holding that the right to present a defense is violated where the court excludes evidence that is "relevant, material and . . . vital to the defense." *Alcala v. Woodford*, 334 F.3d 862, 880 (9th Cir. 2003); *Selam v. Warm Springs Tribal Correctional Facility*, 134 F.3d 948, 952 (9th Cir. 1998). In these cases, materiality is left

undefined. However, in the later case of *United States v. Collins*, 551 F.3d 914, 926 (9th Cir. 2009), the court held, following the language of this Court's decision in *Ritchie*, *supra*, that the right of compulsory process grants a defendant the right to introduce evidence that "might influence the determination of guilt."[9]

The Tenth Circuit also imposes a materiality requirement based on *Valenzuela-Bernal*. However, different Tenth Circuit cases define "materiality" differently; indeed, some cases reference inconsistent and contradictory standards within the same opinion. In *Short v. Sirmons*, 472 F.3d 1177, 1189 (10th Cir. 2006), the court recited both the *Agurs* perjured evidence standard (evidence is material if there is a "reasonable likelihood" that it "could have affected the judgment") and the superseding *Bagley* standard (that confidence in the outcome be undermined). In *Patton v. Mullin*, 425 F.3d 788, 797 (10th Cir. 2005), the court used neither of these standards, instead referring to the different *Agurs* test applicable where no defense request was made for exculpatory evidence: creation of a reasonable doubt that did not otherwise exist. *See also Richmond v. Embry*, 122 F.3d 866, 872 (10th Cir. 1997) (also using the creation of a new reasonable doubt test).

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[9] The wide disparity in the treatment of the materiality issue may be illustrated by comparing *Collins* to *McLaurin*, 703 N.E.2d at 26, which expressly rejected the *Ritchie* standard as the appropriate test.

The differing definitions of materiality used in various jurisdictions have led to widely divergent standards for determining when a constitutional violation occurs. *Agurs* set forth three separate standards for use in different situations. Even if not superseded by *Bagley*, all three standards cannot be consistently applied as a single test. For example, the creation of a new reasonable doubt implies that the outcome would have been different; this test is distinct from a standard requiring only a showing that the outcome "could" or "might" have been affected. Similarly, that standard is inconsistent with the *Bagley* test, which (as explained in *Kyles*) does not require a showing that a different outcome was probable. Nor do any of these cases explain why a materiality standard is necessary at all, or why the *Valenzuela-Bernal* analysis, expressly applicable only where witnesses have been deported, should be imported into cases involving exclusion of trial evidence that does not involve deported witnesses.

B. Relevance should be the proper test for a constitutional violation.

The First Circuit, in *United States v. Bailey*, 834 F.2d 218, 223 (1st Cir. 1987), explained that the *Valenzuela-Bernal* test cannot be grafted onto non-deportation cases, because the test was designed to strike a balance between the governmental interest in enforcing immigration laws and the defendant's need for the evidence: "We don't view *Valenzuela* as setting forth a static rule in respect to the showing a

defendant must make in every case." *Accord State v. Carlos*, 17 P.3d 118, 122 (Ariz.App. 2001) (concluding that the holding of *Valenzuela-Bernal* is limited to situations involving deported witnesses).

Bailey involved a defendant's desire to interview jurors. However, in cases involving exclusion of defense evidence, the First Circuit similarly has held that the exclusion of relevant and reliable evidence is a constitutional violation without a further showing. *DiBenedetto v. Hall*, 272 F.3d 1, 7-8 (1st Cir. 2001) ("Under the Sixth Amendment Compulsory Process Clause, criminal defendants generally have the right to present 'competent, reliable . . . exculpatory evidence.'" (citing *Crane*, 476 U.S. at 690)); *Pettijohn v. Hall*, 599 F.2d 476, 480 (1st Cir. 1979) ("Exclusion of relevant exculpatory evidence infringes upon the fundamental right of an accused to present witnesses in his own defense.").[10]

Eighth Circuit cases reference the materiality requirement of *Valenzuela-Bernal*, but the Eighth Circuit generally equates materiality with relevance, such that exclusion of relevant and otherwise admissible evidence constitutes a constitutional violation. For example, in *United States v. Holmes*, 413 F.3d 770, 774 (8th Cir. 2005), the court noted that the "meaningful opportunity to present a complete defense" under *Crane*, 476 U.S. at 690, includes the

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[10] Although *Pettijohn* predates *Valenzuela-Bernal*, no subsequent case law re-examines this holding.

right to present material and favorable testimony. The *Holmes* court then explained: "The testimony of these witnesses is relevant, and therefore a part of Mr. Holmes's complete defense." *Id.* Similarly, in *United States v. Turning Bear*, 357 F.3d 730, 735 (8th Cir. 2004), the court, after noting the materiality requirement, held that because "the testimony was clearly relevant to one of the central issues of the case . . . the exclusion violated Mr. Turning Bear's right to put on witnesses in his defense."[11]

Several states similarly find that the exclusion of relevant evidence is a constitutional violation, without a further showing. *See, e.g., State v. Diaz*, 100 Hawai'i 210, 226, 58 P.3d 1257 (2002) (right to present evidence is right to present "relevant and beneficial" testimony); *People v. Hudy*, 73 N.Y.S.2d 40, 57, 535 N.E.2d 250 (1988) (holding that exclusion of relevant impeachment evidence was a constitutional violation, without further analysis); *State v. Moesle*, 181 OhioApp.3d 696, 700, 910 N.E.2d 531 (2009) (right to compulsory process denied where court disallowed presentation of evidence "relevant to the theory of . . . defense"); *State v. Pulizzano*, 155 Wis.2d 633, 646, 456 N.W.2d 325 (1990) (right to

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[11] As in other circuits, pertinent Eighth Circuit case law is inconsistent. In *United States v. Ladoucer*, 573 F.3d 628, 635 (8th Cir. 2009), the court cited *Agurs*, 427 U.S. at 104, to define materiality: "Materiality in this context refers to 'a concern that the suppressed evidence might have affected the outcome of the trial.'"

present a defense encompasses "the constitutional right to present relevant evidence not substantially outweighed by its prejudicial effect").

As described above, the reference in *Washington* to "relevant and material" evidence appears to merely refer to evidentiary standards that are now incorporated into the single concept of relevance under the Federal Rules of Evidence. *Washington* thus provides some support for the proposition that a constitutional violation is stated whenever relevant evidence is excluded. *See also State v. Tran*, 743 So.2d 1275, 1281 (La.App. 1999) (defining material evidence, for purposes of the right to present a defense, as evidence that is "of consequence" to the action). The notion that relevance is the touchstone of the constitutional right to present a defense is also implicit in the *Ritchie* observation that this right encompasses the introduction of evidence that "might influence the determination of guilt." 480 U.S. at 55. Evidence that is relevant is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Fed. R. Evid. 401. By definition, such evidence "might" influence the jury's determination. *See also United States v. Nixon*, 418 U.S. 683, 711 (1974) (to vindicate right to compulsory process, "it is essential that all relevant and admissible evidence be produced").

None of the cases imposing a constitutional materiality standard have suggested why a materiality requirement is necessary. If the function of such

a requirement is to ensure that convictions are reversed only when the evidence carries sufficient weight to affect the outcome, then that function is already served by the constitutional harmless error analysis to which the erroneous exclusion of defense evidence would be subject. *See Chapman*, 386 U.S. at 22 (constitutional harmless error rules "serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any likelihood of having changed the result of the trial"). Because the harmless error standard already prevents reversals for constitutional errors of minor importance, there is no need to impose an additional test that demonstrates the importance of the evidence in order to establish the presence of a constitutional error in the first place.

This conclusion is consistent with the plain language of the Compulsory Process Clause, which requires that a defendant "have compulsory process for obtaining witnesses in his favor. . . ." U.S. Const., Amend. 6. The clause explicitly imposes a requirement that the evidence be favorable, but does not require any additional showing. While the scope of a defendant's rights under the clause may be properly limited by excluding evidence which fails to comport with reasonable state evidentiary rules, *Taylor v. Illinois*, 484 U.S. 400, 410 (1988), nothing in the text of the clause suggests that the evidence must also meet a test of weightiness or importance.

The conclusion that the exclusion of relevant evidence is a constitutional violation also comports

with the purpose of the Compulsory Process Clause. As explained in *Washington*:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense.

388 U.S. at 19. If the purpose of the clause is to permit presentation of the defendant's version of the facts, this purpose necessarily encompasses all relevant defense evidence.

III. The Colorado Supreme Court erred in requiring a greater showing than relevance in order to establish a constitutional violation.

In the present case, the Colorado Supreme Court correctly found that there is no requirement of "constitutional materiality as a prerequisite to treating the trial court's evidentiary error as a federal constitutional error." App. 19. However, the court then substituted another incorrect test for determining the existence of constitutional error based upon the exclusion of defense evidence. The court began its

analysis by quoting *Crane* to the effect that a defendant is guaranteed "a meaningful opportunity to present a complete defense." App. 17. The court then added a crucial word to the *Crane* language to arrive at a new test: an erroneous evidentiary ruling does not violate a defendant's constitutional right to present a defense unless it "deprive[s] the defendant of *any* meaningful opportunity to present a complete defense." App. 19 (emphasis added).

Based upon this recasting of *Crane*, the Colorado Supreme Court announced a standard that places an almost insuperable burden on defendants. The right to a meaningful opportunity to present a defense, the court found, is impermissibly abridged "only where the defendant [is] denied virtually his only means of effectively testing significant prosecution evidence." App. 22. Under this test, a defendant's constitutional right to present a defense is not violated even when evidence of significance to the defense is erroneously excluded, so long as the defendant is permitted to present *some* evidence. This test effectively truncates the constitutional right to an opportunity to present a partial defense, thereby contravening this Court's pronouncements that a defendant has the constitutional right to present "a complete defense." *Crane*, 476 U.S. at 690 (emphasis added). Also, the Colorado test is an amorphous one that will lead to arbitrary and inconsistent results. Colorado judges will be required to make ad hoc assessments of how much defense evidence can be excluded before the right to present a defense is violated.

At least two other states appear to use a test similar to the Colorado test. In *Potier v. State*, 68 S.W.3d 657, 666 (Tex.Crim.App. 2002), the court, after reviewing relevant precedent of this Court, determined that the exclusion of relevant evidence was not constitutional error because the exclusion "did not prevent the appellant from presenting a defense." Similarly, the Michigan Court of Appeals has held that the exclusion of relevant evidence was not of constitutional dimension because the defendant "was not totally precluded" from presenting his defense. *People v. Steele*, 283 Mich.App. 472, 489, 769 N.W.2d 256 (2009).

The Eighth Circuit case of *Holmes*, *supra*, reveals the impropriety of the Colorado test. Like the Colorado Supreme Court here, the court in *Holmes* quoted the pronouncement in *Crane*, 476 U.S. at 690, that a defendant is guaranteed "a meaningful opportunity to present a complete defense." 413 F.3d at 774. As noted, the Colorado Supreme Court recast this language so that the right to present a *complete* defense is satisfied if the defendant has been permitted to introduce *some* evidence in support of his defense. The Colorado Supreme Court effectively deleted the word "complete" from *Crane*. In contrast, the Eighth Circuit applied the *Crane* language exactly as it was stated: an opportunity to present a "complete" defense means the opportunity to present all, and not just some, relevant evidence. *Holmes*, 413 F.3d at 774.

The evidence excluded in this case was clearly relevant. As the prosecution itself noted in closing statements to the jury, the state's case rested entirely on S.M.'s credibility. The excluded evidence would have directly detracted from her credibility. Howard's testimony would have demonstrated a motive for a false report of sexual assault, would have contradicted S.M.'s testimony about both the timeframe and location of the alleged abuse, would have impeached S.M.'s explanation for why the abuse suddenly stopped, and would have impeached S.M.'s explanation for failing to definitively identify Krutsinger as the alleged abuser. Despite the relevance of this evidence to defendant's theory of defense that S.M.'s accusations were not credible, the admittedly erroneous exclusion of the evidence was found to violate no constitutional right under the stringent test developed by the Colorado Supreme Court. If a defendant truly has a right to present a "complete" defense, then the exclusion of such relevant evidence must be constitutional error.

CONCLUSION

Charles Krutsinger respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Dated: February 19, 2010

219 P.3d 1054

Oral Argument Transcripts with Streaming Media

Supreme Court of Colorado,
En Banc.
Charles M. KRUTSINGER, Petitioner
v.
The PEOPLE of the State of Colorado, Respondent.

No. 08SC378.
Oct. 13, 2009.
Rehearing Denied Nov. 23, 2009.

The Dubofsky Law Firm, P.C., Jean E. Dubofsky, Boulder, Colorado, Springer & Steinberg, P.C., Michael P. Zwiebel, Denver, Colorado, Dean Neuwirth P.C., Dean Neuwirth, Denver, Colorado, Attorneys for Petitioner.

John W. Suthers, Attorney General, Majid Yazdi, Assistant Attorney General, Denver, Colorado, Attorneys for Respondent.

Justice COATS delivered the Opinion of the Court.

Krutsinger petitioned for review of the court of appeals' judgment affirming his convictions for multiple sexual-assault-on-a-child and incest-related crimes. *See People v. Krutsinger,* No. 06CA0532, 2008 WL 963034 (Colo.App. April 10, 2008) (not selected for official publication). On direct appeal, the court of appeals accepted the People's concession that the trial court erred in excluding testimony from a therapist of the defendant's stepdaughter, on grounds of privilege.

Rather than deciding whether the error was harmless, however, the court of appeals remanded for a hearing to obtain the therapist's testimony and to determine whether that testimony was constitutionally material to the defendant's case. *See People v. Krutsinger,* 121 P.3d 318 (Colo.App.2005). Upon recertification, the court of appeals agreed with the trial court's assessment that the error was not material and therefore not of constitutional magnitude, and it found the error harmless according to the standard for evaluating nonconstitutional error. The court of appeals therefore affirmed the defendant's convictions and ten-year sentence.

By conditioning a designation of federal constitutional error on a determination that the error would impact the verdict sufficiently to be constitutionally material, the court of appeals applied the wrong legal standard. Because, however, we determine that the exclusion of Dr. Howard's testimony did not deprive the defendant of a meaningful opportunity to present a complete defense, the error did not rise to the level of federal constitutional error, even under the proper standard. Because we also find that the error was harmless according to the standard for nonconstitutional error in this jurisdiction, the judgment of the court of appeals is affirmed.

I.

Charles M. Krutsinger was charged with ten counts of sexual assault on a child, nine of which

were allegedly committed as part of a pattern of abuse, as well as ten counts of sexual assault on a child by one in a position of trust and ten counts of aggravated incest. All of the counts alleged, in the same generic terms, that Krutsinger subjected his stepdaughter to sexual contact between the years 1991 and 1997. The jury returned guilty verdicts on all counts, and the court imposed the minimum allowable sentence for each count, all to be served concurrently. Because the pattern-of-abuse verdicts required sentencing to at least the midpoint of the presumptive range for a class 3 felony, the defendant was sentenced on some counts to terms as great as ten years in the department of corrections.

At age sixteen, the defendant's stepdaughter first accused him of sexually assaulting her, years earlier when she was a young child. In a number of statements and interviews before trial, and again in her testimony at trial, she accused him of subjecting her, over a period of years, to continuous acts of sexual contact of two general types. She described how he at times would rub his genital region against her from behind in simulated acts of sexual intercourse, and how at other times he would direct her hands inside his pants and underwear and cause her to manipulate his penis.

The defendant testified on his own behalf and denied all of the accusations. Because the acts described by his stepdaughter were allegedly committed much earlier and over a period of years, with only general references to time and place, and

because she was the only witness professing first-hand knowledge of the assaults, which by their very nature were not susceptible of physical corroboration, the defense focused heavily on the circumstances of and possible motives for her delayed outcry and the numerous inconsistencies in her testimony and various pretrial statements. In anticipation of these defenses, the prosecution presented, in addition to the stepdaughter's own testimony about these earlier statements, the testimony of her mother and others to whom she claimed to have made some manner of outcry statement, including a childhood friend, her school counselor, her school resource officer, and a sheriff's department investigator. The prosecution also presented an expert on the psychology of child sexual assault victims, along with a videotape of an interview conducted by a victim advocacy center.

The evidence presented at trial concerning her delayed outcry was to the effect that in the fall of 2002, the stepdaughter, after several abortive attempts, confided in her mother that she had been sexually abused as a child and, at some point thereafter, indicated that the perpetrator may have been her stepfather. Shortly after a session with a therapist, Dr. Patricia Howard, to whom her mother and stepfather had sent her, the stepdaughter told her mother in a long-distance telephone conversation that she was certain her stepfather was the perpetrator; and although her mother returned home several days later and asked for time to consider how to proceed, she made explicit outcry to her school

counselor the next day. She was subsequently interviewed by the school resource officer and a sheriff's department investigator, and even later by a victim advocacy center.

Through cross-examination, defense counsel exposed the stepdaughter's growing behavioral problems, substance abuse, and increasingly poor academic performance. She was forced to concede her dislike for her stepfather and particularly what she considered to be his interference in her affairs by communicating with her teachers, which effectively exposed lies she had told about certain school assignments. She also conceded disputes with her mother, who at one point, before retracting it, made a demand that she move to Washington state to live with her father. Mainly, however, defense counsel was able to expose numerous inconsistencies in her testimony and previous statements, including inconsistencies in her accounts concerning when the assaults began and ended, and how frequently they occurred; the nature and location of the last assault; whether the defendant ejaculated during the assaults; when and where the assaults typically occurred and how the defendant was typically dressed; other people she claimed to have told about the assaults; precisely what and when she told her mother about the involvement of her stepfather; and the details of her meetings with a family friend who offered to help, her school counselor, the sheriff's investigator, and the therapist, Dr. Howard.

With regard to Dr. Howard in particular, defense counsel confronted the defendant's stepdaughter with the therapist's notes of their first session, which indicated that she had told Howard she thought the assaults continued until the fourth grade, despite her testimony and other pre-trial interviews indicating that they continued until the sixth grade. The stepdaughter was quite adamant that she had always described the assaults as continuing from about her second through sixth grade years, while the family lived in one particular residence. In addition, despite asserting at trial that she had always been quite certain that her stepfather was the perpetrator, she admitted telling Howard only that she was "almost certain," explaining that she was reluctant in part because Howard had informed her of Howard's legal duty to report any accusation against the defendant.

At the conclusion of the People's case, defense counsel sought to endorse Howard as a rebuttal witness. After an in-camera hearing, in which Dr. Howard testified that she had spoken with and turned over her notes to a defense investigator when shown a release signed by the child's mother, the trial court construed the release as extending only to her records and not actual testimony about the sessions. Defense counsel offered to elicit from Dr. Howard live testimony concerning the matters described in her notes of the first session, namely that the stepdaughter trusted and loved some of her teachers, apparently to discredit her explanation for failing to report sooner; that she was only beginning to

remember more about the assaults but was almost sure they were committed by her stepfather and continued until the fourth grade; and that she did not like her stepfather and thought her mother also did not love her and was covering up for him. The court denied the proffer on grounds of psychologist-patient privilege.

On appeal, the People confessed error in the exclusion of Dr. Howard's proffered testimony but asserted that the error was harmless. Although the court of appeals rejected the defendant's other assignments of error, it held that by testifying about her sessions with Dr. Howard, the defendant's stepdaughter effectively waived any psychologist-patient privilege. Rather than considering the harmfulness of the error, however, the appellate court remanded for a determination by the trial court, after entertaining additional testimony from Dr. Howard, whether her testimony would have been both favorable to the accused and constitutionally material, and therefore require reversal as federal constitutional trial error; and even if these conditions were not met, whether its exclusion required reversal under the ordinary harmless-error standard.

On remand, the district court heard from Dr. Howard, who testified from her notes, admitting that she lacked any independent recollection of what occurred during the therapy sessions. She also testified, however, that she would not have told the child about her reporting obligations because that would have amounted to circumventing the law. The district

court ultimately determined that its error in treating Howard's proffered testimony as privileged was not constitutionally material and was, in fact, harmless. Upon recertification to the court of appeals, that court agreed that the error was not of constitutional magnitude and determined, for reasons of its own, that the error was harmless.

We granted the defendant's petition for a writ of certiorari challenging the court of appeals' imposition of a materiality requirement as a prerequisite to classification of the trial court's error as federal constitutional error, as well as its ultimate determination that the exclusion of Dr. Howard's proffered testimony was harmless.

II.

Federal constitutional errors that are structural in nature, infecting the entire trial process and rendering the trial fundamentally unfair, require automatic reversal. *See, e.g., Neder v. United States,* 527 U.S. 1, 7-8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *Sullivan v. Louisiana,* 508 U.S. 275, 281, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); *Brecht v. Abrahamson,* 507 U.S. 619, 629-30, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); *Rose v. Clark,* 478 U.S. 570, 578, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986); *Chapman v. California,* 386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Most federal constitutional errors, however, are in the nature of trial, rather than structural, error and can be harmless. *See, e.g., Neder,*

527 U.S. at 8, 119 S.Ct. 1827; *Arizona v. Fulminante,* 499 U.S. 279, 306-07, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). These federal constitutional trial errors, at least when properly preserved and asserted on direct rather than collateral review, are nevertheless subject to a more onerous harmless-error standard than non-constitutional trial errors in federal criminal cases. *See Brecht,* 507 U.S. at 637, 113 S.Ct. 1710.

The constitutional harmless-error standard fashioned by the United States Supreme Court requires that before a federal constitutional error can be held harmless, the reviewing court must be able to declare a belief that it was harmless beyond a reasonable doubt. *Chapman,* 386 U.S. at 24, 87 S.Ct. 824. In articulating this standard, the Supreme Court made clear that it considered there to be little, if any, difference between its requirement that the beneficiary of a constitutional error prove beyond a reasonable doubt that the error complained of did not contribute to the verdict and its earlier holding in *Fahy v. Connecticut,* 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963), that the defendant in that case was sufficiently prejudiced to require reversal where there was a reasonable possibility that the admission of unconstitutionally seized evidence might have contributed to his conviction. By contrast, the harmless-error standard applicable to federal nonconstitutional trial error, which is grounded in federal statute and rule, *see* 28 U.S.C. § 2111; Fed.R.Crim.P. 52(a), requires reversal only if the error had a substantial and injurious effect or influence in determining the

jury's verdict. *See Brecht,* 507 U.S. at 637-38, 113 S.Ct. 1710; *Kotteakos v. United States,* 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946).

While the difference between the two standards is somewhat imprecise, and has even been characterized as slight, *see Strickler v. Greene,* 527 U.S. 263, 300, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (Souter, J., concurring in part and dissenting in part), the categorization of any error as federal constitutional error is nevertheless significant. Although both standards are outcome determinative, in the sense that the appropriateness of reversal as a remedy is made a function of the error's likely impact on the jury's verdict, the *Kotteakos* or nonconstitutional harmless-error standard is clearly the "less onerous" of the two, meaning it will more readily produce a finding of harmlessness. *See Brecht,* 507 U.S. at 623, 113 S.Ct. 1710. In addition, however, the designation of any particular error as federal constitutional error has jurisdictional significance, rendering the appropriate remedy for that error a federal question, to be resolved according to a federally determined standard, subject to federal review. *See Chapman,* 386 U.S. at 21, 87 S.Ct. 824.

Since the Supreme Court made clear in *Fahy* and *Chapman* that automatic reversal is not required for all federal constitutional errors, it has designated a number of particular errors structural, requiring

automatic reversal,[1] and a number of others federal constitutional trial error, subject to the *Chapman* harmless-error standard.[2] It has also, however,

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[1] Such structural errors include the complete denial of counsel, *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), having a biased judge preside over trial, *Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), admitting a coerced confession, *see Payne v. Arkansas,* 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958), having a magistrate preside over trial without the defendant's consent, *Gomez v. United States,* 490 U.S. 858, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989), racial discrimination in the selection of a grand jury, *Vasquez v. Hillery,* 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986), the denial of self-representation, *McKaskle v. Wiggins,* 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), the denial of a public trial, *Waller v. Georgia,* 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), and defective reasonable-doubt instruction, *Sullivan,* 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182. *See also Washington v. Recuenco,* 548 U.S. 212, 213, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) ("Only in rare cases has this Court ruled an error 'structural,' thus requiring automatic reversal."). These types of errors "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.'" *Neder,* 527 U.S. at 8-9, 119 S.Ct. 1827 (quoting *Rose,* 478 U.S. at 577-78, 106 S.Ct. 3101)).

[2] *E.g., Deck v. Missouri,* 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005) (shackling the defendant in front of the jury); *Neder,* 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (omission of an element of the offense from jury instructions); *Brecht,* 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (prosecutor's improper comment on defendant's silence following *Miranda* warnings); *Stringer v. Black,* 503 U.S. 222, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992) (use of a vague or imprecise aggravating factor in a capital sentencing proceeding); *Satterwhite v. Texas,* 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988) (admission of

(Continued on following page)

classified certain other actions or omissions by the government or defense counsel, whether or not error in and of themselves, as federal constitutional error when their effect is to deprive a defendant of fundamental fairness in the trial process. Application of the *Chapman* harmless-error standard to this general class of constitutional error would be superfluous because the conduct at issue can rise to the level of constitutional error only if it can be shown to have impacted the verdict at least as clearly as would bar a finding of harmlessness according to the

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evidence at the sentencing stage of a capital case in violation of the right to counsel); *Pope v. Illinois,* 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987) (unconstitutional standard for obscenity in jury instruction); *Rose,* 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (jury instruction containing an unconstitutional conclusive presumption); *Lee v. Illinois,* 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986) (admission of accomplice's confession without the benefit of cross-examination in violation of the Confrontation Clause); *Rushen v. Spain,* 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983) (denial of the right to be present during a trial proceeding); *Moore v. Illinois,* 434 U.S. 220, 98 S.Ct. 458, 54 L.Ed.2d 424 (1977) (admission of evidence obtained in violation of an accused's right to counsel); *Schneble v. Florida,* 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972) (admission at trial of an out-of-court statement of a non-testifying codefendant in violation of the Confrontation Clause); *Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970) (admission of evidence obtained in violation of the Fourth Amendment); *Coleman v. Alabama,* 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970) (denial of indigent's right to appointed counsel at a preliminary hearing); *Anderson v. Nelson,* 390 U.S. 523, 88 S.Ct. 1133, 20 L.Ed.2d 81 (1968) (prosecutor's improper comment on defendant's failure to testify).

Kotteakos, and therefore *Chapman,* standard. *See Kyles v. Whitley,* 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

The Supreme Court has found this outcome-determinative approach to be appropriate only for constitutional claims which "by their very nature require a showing of prejudice with respect to the trial as a whole," *Delaware v. Van Arsdall,* 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986), and it has thus far applied it only to actions or omissions of two general types: incompetent representation by defense counsel, *see Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and governmental denial of access to favorable evidence, *see United States v. Bagley,* 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *United States v. Valenzuela-Bernal,* 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982); *see generally* 6 Wayne R. LaFave et al., *Criminal Procedure* § 24.3(a), at 339 (3d ed. 2007) ("The Supreme Court has characterized various constitutional standards as combining to create 'what might loosely be called the area of constitutionally guaranteed access to evidence.'" (quoting *Arizona v. Youngblood,* 488 U.S. 51, 55, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988))). The degree of prejudice, or likely impact on the verdict, required to elevate such objectionable conduct to the level of federal constitutional error – what has been referred to as the standard of materiality – has been articulated by the Supreme Court in various terms, over a span of years,

and according to the nature and circumstances of the conduct at issue.

After considerable evolution, however, the Court has come to describe this standard, most particularly in the context of a failure to disclose favorable evidence, as a reasonable probability that the result would otherwise have been different. *See Bagley,* 473 U.S. at 678-83, 105 S.Ct. 3375 (recounting history of various reformulations and adopting *Strickland* standard as sufficiently flexible for all failure to disclose cases); *see also Kyles,* 514 U.S. at 432-37, 115 S.Ct. 1555 (clarifying the contours of that standard). While the Supreme Court has made abundantly clear that it does not intend its use of the term "reasonable probability" to require a showing that the defendant would more likely than not have received a different result, it has also made clear that it does intend to require a demonstration of greater harm than would be sufficient for reversal under the *Kotteakos* harmless-error standard for federal nonconstitutional error, *Kyles,* 514 U.S. at 436, 115 S.Ct. 1555, and necessarily therefore, under the *Chapman* constitutional harmless-error standard, *see Strickler,* 527 U.S. at 291, 119 S.Ct. 1936 (finding a "reasonable *possibility,*" although not a "reasonable *probability,*" of a different result) (emphasis in original); *see also id.* at 300, 119 S.Ct. 1936 (Souter, J., concurring in part and dissenting in part) (suggesting that the constitutional materiality standard be distinguished from the *Chapman/Fahy* "reasonable possibility"

standard by use of the term "significant possibility" rather than "reasonable probability").[3]

Whether particular misconduct or a particular court ruling is capable of being viewed as constitutional error in itself, or can be so viewed only if the defendant first establishes a reasonable probability of prejudicial impact on the verdict, has not always been clear. *See generally* 7 LaFave, § 27.6(d), at 117 n. 76 (characterizing this issue as one that has repeatedly divided the Court in the years since *Chapman*). In *Van Arsdall,* however, the Supreme Court expressly rejected an invitation to mandate a showing of "'outcome determinative' prejudice" in order to state a violation of the Confrontation Clause. 475 U.S. at 679-80, 106 S.Ct. 1431. *But see id.* at 685, 106 S.Ct. 1431 (White, J.,

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[3] Since some probability greater than zero would normally be assigned to any outcome or occurrence that is not impossible, it is not readily apparent why a "reasonable possibility" and a "reasonable probability" should convey different meanings. While it has always been important to distinguish an outcome that is merely "possible" from one that is "probable," in the sense that it is more likely than not, the Supreme Court has repeatedly made clear that its use of the term "reasonable probability" in this context is not intended to mean that an outcome or occurrence must actually be "probable." Nevertheless, confusion about this point appears to have motivated Justice Souter's suggestion to differently modify the term "possibility," rather than introducing the notion of "probability" at all. Whatever the merits of this usage, however, it seems beyond dispute that the Supreme Court intends a greater likelihood of occurrence when it refers to a "reasonable probability," than when it refers to a "reasonable possibility."

concurring) ("It makes much more sense to hold that no violation of the Confrontation Clause has occurred unless there is some likelihood that the outcome of the trial was affected."). Expressly distinguishing a violation of the Confrontation Clause from those "constitutional claims that require a showing of prejudice with respect to the trial as a whole," the Court held that "the focus of the Confrontation Clause is on individual witnesses." *Id.* at 680, 106 S.Ct. 1431. In *Van Arsdall,* the Court found the trial court's limitation on cross-examination, without regard to materiality, to be constitutional error, subject to the *Chapman* harmless-error standard. *Id.*

In *Richmond v. Embry,* 122 F.3d 866 (10th Cir.1997), a case heavily relied on by the court of appeals below, the Tenth Circuit Court of Appeals, however, held that the trial court's exclusion of evidence of an alternate sexual partner amounted to the denial of a right arising under the Fifth and Fourteenth Amendment guarantees of due process and the Sixth Amendment right to compulsory process, rather than a right arising under the Sixth Amendment's Confrontation Clause. Reasoning further that in order to establish a violation of the right to compulsory process, a fair trial, or due process, a defendant must demonstrate a denial of fundamental fairness, that court found it appropriate to apply the outcome-determinative approach of the Supreme Court's denial-of-access cases, conditioning classification of the error in that case as "constitutional

error" on the materiality of the excluded evidence. *Id.* at 872.

Whether or not the Tenth Circuit's conclusion concerning a misapplication of Colorado's Rape Shield Statute can be squared with United States Supreme Court jurisprudence, the rationale of *Richmond* cannot be applied equally to the exclusion of Dr. Howard's testimony in this case. Dr. Howard had no first-hand knowledge of the charged offenses and clearly was not an alternate suspect. Her testimony was offered solely to impeach the credibility of the defendant's stepdaughter.

Error in limiting a defendant's ability to challenge the credibility of the evidence against him, either by restricting the cross-examination of prosecution witnesses or by restricting the presentation of defense evidence, implicates "the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" *Crane v. Kentucky,* 476 U.S. 683, 690-91, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting *United States v. Cronic,* 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)) (finding denial of right to present evidence challenging credibility of defendant's confession to be constitutional error subject to *Chapman* harmless-error analysis). Whether the guarantee of a *meaningful* opportunity to present a complete defense is "rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment," it cannot be denied without violating the

federal constitution. *Id.* at 690, 106 S.Ct. 2142 (internal citations omitted).

At least with regard to impeachment of the prosecution's case, the Supreme Court has largely resolved the question of the appropriate standard. *See id.* at 690-91, 106 S.Ct. 2142; *Van Arsdall,* 475 U.S. at 679-84, 106 S.Ct. 1431. Although the nature and extent of any ruling limiting the presentation of defense evidence will necessarily determine whether it amounts to constitutional error, just as the nature and extent of the trial court's limitation on cross-examination were determinative in *Van Arsdall,* the focus of the inquiry remains on individual witnesses rather than the trial as a whole. As the Supreme Court made clear with regard to the Confrontation Clause in particular, a defendant necessarily states a violation of his constitutional right to present a defense by demonstrating that "(a) reasonable jury might have received a significantly different impression of a witness's credibility" had the court not erroneously excluded otherwise appropriate evidence. *See Van Arsdall,* 475 U.S. at 680, 106 S.Ct. 1431.

Nor has this court previously suggested otherwise. In *People v. Melendez,* 102 P.3d 315 (Colo.2004), although we referenced *Valenzuela-Bernal* as support for the proposition that the right to present defense evidence is not absolute, *see Melendez,* 102 P.3d at 320, we did not condition a finding of constitutional error in that case on the demonstration of a reasonable probability or reasonable likelihood that the outcome of the trial would have been different but

for the trial court's misapplication of the sequestration rule. Quite the contrary, given the nature of the testimony for which the individual witness was offered, we found his complete exclusion to be constitutional error, in itself, and we reversed because we were not convinced beyond a reasonable doubt of its harmlessness, as required by the more onerous *Chapman* standard. *Id.* at 321-22; *see also Golob v. People*, 180 P.3d 1006, 1013-14 (Colo.2008) (expressly applying harmless-beyond-a-reasonable-doubt standard to abridgment of defendant's right to call witnesses in his defense).

The court of appeals therefore erred in requiring a finding of constitutional materiality as a prerequisite to treating the trial court's evidentiary error as federal constitutional error. Rather than presuming that the exclusion of defense impeachment evidence could rise to the level of federal constitutional error only if its admission would have, considering the trial as a whole, created a reasonable doubt, the court of appeals should have inquired whether the trial court's evidentiary ruling, in and of itself, deprived the defendant of any meaningful opportunity to present a complete defense.

III.

It does not follow, of course, that every restriction on a defendant's attempts to challenge the credibility of evidence against him, or even every erroneous evidentiary ruling having that effect, amounts to

federal constitutional error. In both *Van Arsdall* and *Crane,* the Court emphasized the wide latitude that must remain with trial judges and the Court's traditional reluctance to impose constitutional constraints on the power of states to exclude evidence through the application of evidentiary rules. *See Crane,* 476 U.S. at 689, 106 S.Ct. 2142; *Van Arsdall,* 475 U.S. at 679, 106 S.Ct. 1431. In each of those cases, restriction on the defendant's efforts to challenge the credibility of evidence against him stated the violation of a federal constitutional right only because the trial court's ruling, under the circumstances of each case, effectively barred the defendant from meaningfully testing evidence central to establishing his guilt. In *Van Arsdall,* the Court concluded that the defendant had successfully stated a violation of the Confrontation Clause only because the trial court prohibited "*all* inquiry" into the possibility of prosecution bias by a witness who placed the defendant at the scene, near the time of the murder, and because a "reasonable jury might have received a significantly different impression of [that witness's] credibility." 475 U.S. at 679-80, 106 S.Ct. 1431.

By contrast, the defendant in this case was not prohibited from demonstrating motive or bias on the part of the witness or from exposing to the jury virtually any additional facts from which they could draw inferences relating to her reliability. The trial court's error merely prohibited Dr. Howard from describing in live testimony the matters contained in her notes, with regard to which the court held the

patient-psychologist privilege to already have been waived. Defense counsel was permitted to question the witness about the content of Dr. Howard's notes and, in fact, expressly challenged her to explain her statement that the assaults stopped when she was in the fourth grade, which was inconsistent with her testimony that they continued until the sixth grade. Although not prohibited from doing so, defense counsel made no attempt to question the witness about her other statements noted in his offer of proof or to have the notes themselves introduced into evidence.

Perhaps more importantly, however, defense counsel was not restricted from challenging the witness's credibility by drawing the jury's attention to numerous inconsistencies between her testimony and either her various pretrial statements or the contradictory testimony of other witnesses; her failure to make outcry sooner, despite being surrounded by adults whom she admittedly trusted and respected; and her dislike for, and potential motives for lying about, her stepfather. With regard, in particular, to Dr. Howard's testimony on remand to the effect that she would not have warned the witness of her duty to report, it was undisputed that the defendant's stepdaughter was in fact told about the statutory duty by her school counselor. Moreover, she separately explained her reluctance to positively name her stepfather as the perpetrator, in a number of her early attempts at outcry, on the grounds that she was simply not yet psychologically ready. In any event,

however, defense counsel never suggested in his offer of proof that Dr. Howard would also contradict this statement by the witness.

Although perhaps no more precise than the "reasonable probability" formula of the Supreme Court's outcome-determinative approach, the standard or test for assessing whether a defendant's right to confront or present a defense has been violated by evidentiary rulings is clearly dependent upon the extent to which he was permitted to subject the prosecutor's case to "meaningful adversarial testing." *Crane,* 476 U.S. at 691, 106 S.Ct. 2142. And while we have previously characterized a defendant's right to call witnesses in his own defense as a constitutional right, we have found an abridgment of that right only where the defendant was denied virtually his only means of effectively testing significant prosecution evidence. *See, e.g., Golob,* 180 P.3d at 1013 (constitutional error in excluding expert testimony and thereby leaving unchallenged the most significant item of evidence against defendant). Under the circumstances of this case, any evidentiary error committed by the trial court in limiting testimony by Dr. Howard did not rise to the level of federal constitutional error.

IV.

While this jurisdiction is not bound by the Supreme Court's articulation of the federal nonconstitutional harmless-error standard, Crim. P. 52(a) is

almost identical to Fed.R.Crim.P. 52(a), and this court has long cited *Kotteakos* with favor and paraphrased its articulation of that standard. *See, e.g., People v. Quintana,* 665 P.2d 605, 612 (Colo.1983) ("[T]he appropriate question is whether the error substantially influenced the verdict or affected the fairness of the trial proceedings."), *see also Liggett v. People,* 135 P.3d 725, 733 (Colo.2006); *People v. Summitt,* 132 P.3d 320, 327 (Colo.2006); *Medina v. People,* 114 P.3d 845, 857 (Colo.2005); *People v. Welsh,* 80 P.3d 296, 310 (Colo.2003); *Masters v. People,* 58 P.3d 979, 1002-03 (Colo.2002). We have not, however, always maintained the Supreme Court's strict hierarchical distinction between a "reasonable possibility" and a "reasonable probability." *See, e.g., Salcedo v. People,* 999 P.2d 833, 841 (Colo.2000) (recasting, without expressly acknowledging it, the "reasonable possibility" test of *Tevlin v. People,* 715 P.2d 338, 342 (Colo.1986), as a "reasonable probability" standard). To complicate matters further, in the last decade we have regularly equated the Crim. P. 52(a), nonconstitutional harmless-error standard with a failure to establish a reasonable probability that the error contributed to the verdict. *See, e.g., Yusem v. People,* 210 P.3d 458, 469-70 (Colo.2009); *Crider v. People,* 186 P.3d 39, 42 (Colo.2008); *Raile v. People,* 148 P.3d 126, 134 (Colo.2006); *Mata-Medina v. People,* 71 P.3d 973, 980 (Colo.2003); *Grant v. People,* 48 P.3d 543, 554 (Colo.2002); *People v. Garcia,* 28 P.3d 340, 344 (Colo.2001).

Despite the fact that both are outcome-determinative standards to which the term "reasonable probability" has been applied, we have never suggested that the harmless-error standard in this jurisdiction requires the same showing with respect to impact that would be required to establish federal constitutional materiality in the nondisclosure context; or that a defendant in this jurisdiction has a heavier burden to demonstrate harmlessness than would be true under the *Kotteakos,* federal nonconstitutional harmless-error standard. It is clearly the case, in fact, that by "reasonable probability" we also intend something less than a preponderance of the evidence; and similarly, that the Crim.P. 52(a) standard, just as the federal *Kotteakos* standard, will more readily produce a finding of harmlessness than the *Chapman* standard of constitutional harmless error.

Under our own harmless-error standard, the evidentiary error in this case was harmless. Although the harmless-error standard is outcome determinative and therefore must account for an error's impact in light of the evidence as a whole, where the credibility of a single witness is so central to the case against the defendant, the question of harmlessness is closely related to, if not precisely identical with, the question whether he has been deprived of a right to meaningfully challenge credibility. For much the same reasons that the defendant in this case was not deprived of his constitutional right to impeach the credibility of his stepdaughter, the trial court's

evidentiary error did not substantially influence the verdict or affect the fairness of the trial proceedings.

The defendant was permitted to, and did, thoroughly expose the witness's possible motive or bias, her prior inconsistent statements, various reasons why her ability to perceive or recollect the key events may have been limited, and the extent to which her recollection of events was disputed by others with a reason to know. Although the trial court may have erred by restricting Dr. Howard's testimony about her first session with the defendant's stepdaughter, its error did not preclude the defense from speaking with the therapist and using her notes to impeach the stepdaughter's testimony. Nothing in the defendant's offer of proof suggested testimony of a retraction or of equivocation concerning her claims of molestation at the hands of the defendant. At most, the court's error deprived the jury of hearing from one additional witness about similar inconsistencies in the stepdaughter's accounts of the assaults and her own explanations for her late outcry.

Under these circumstances, the defendant has not demonstrated that the exclusion of Dr. Howard's live testimony substantially influenced the verdict or affected the fairness of the trial.

V.

Although the trial court, at the direction of the court of appeals, applied an incorrect test to determine whether its earlier error amounted to

federal constitutional error, its ultimate determination that the error was both nonconstitutional and harmless was correct. The judgment of the court of appeals affirming the defendant's convictions and sentence is therefore affirmed.

COLORADO COURT OF APPEALS

Court of Appeals No.: 06CA0532
Douglas County District Court No. 02CR674
Honorable Paul A. King, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Charles M. Krutsinger,

Defendant-Appellant.

JUDGMENT AFFIRMED AND CASE REMANDED WITH DIRECTIONS

Division III
Opinion by: JUDGE TAUBMAN
Roy and Sternberg*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: April 10, 2008

John W. Suthers, Attorney General, Majid Yazdi, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

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* Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2007.

Jean E. Dubofsky, P.C., Jean E. Dubofsky, Boulder, Colorado; Craig L. Truman, P.C., Craig L. Truman, Denver, Colorado; Dean Neuwirth, P.C., Dean Neuwirth, Denver, Colorado, for Defendant-Appellant

In this appeal following a limited remand, defendant, Charles M. Krutsinger, appeals the judgment of conviction entered on a jury verdict finding him guilty of ten counts each of sexual assault on a child, sexual assault on a child by one in a position of trust, and aggravated incest. We affirm and remand for correction of the mittimus.

The charges in this case arose when the victim, defendant's stepdaughter, told her high school guidance counselor that defendant had sexually molested her when she was a young girl. At trial, the victim testified, as did her mother, her school counselor, a school resource officer, and a sheriff's department investigator, with the latter witnesses corroborating the victim's allegations of sexual abuse. The jury was also shown a videotape of an interview with the victim regarding the abuse, which was conducted by a forensic interviewer from a child advocacy center.

During defendant's case, defendant testified on his own behalf and denied the victim's allegations. However, the trial court rejected his effort to admit Dr. Patricia Howard, a psychologist, as a witness, on the ground that the victim had neither consented to the admission of her testimony nor waived her psychologist-patient privilege. During October and

November 2002, Howard had counseled the victim on four occasions.

In the first appeal in this case, *People v. Krutsinger*, 121 P.3d 318 (Colo. App. 2005) (*Krutsinger I*), a division of this court agreed with defendant's contention and the prosecution's concession that the trial court had erred in excluding Howard's testimony. The division remanded the case to the trial court for a supplemental hearing, at which the trial court could consider Howard's testimony, and then determine whether her testimony would have been material and favorable to defendant's case and whether, had her testimony been admitted at trial, it would have affected the outcome of the case.

On remand, the trial court held the evidentiary hearing as directed by the division. Following Howard's testimony, the trial court issued a detailed written order on February 23, 2006. The trial court concluded that the exclusion of Howard's testimony was not of constitutional dimension and, under the ordinary harmless error standard, the exclusion of Howard's testimony was harmless error.

On appeal, defendant now contends (1) that the trial court erred in concluding that the exclusion of Howard's testimony did not constitute reversible error, (2) that the *Krutsinger I* division erred in not concluding that two instances of alleged prosecutorial misconduct constituted reversible error and in not addressing a third instance of prosecutorial misconduct asserted in the first appeal, and (3) that the trial

court erred in not correcting the mittimus as directed by the division in *Krutsinger I*. We disagree with the first two contentions, but agree with the third.

I. Standard of Review

In *Krutsinger I*, the division outlined the standard of review that would govern the hearing on remand. First, it noted that if the error in the exclusion of Howard's testimony was of constitutional dimension, the "constitutional harmless error" standard applies. Under this standard, the People have the burden of showing beyond a reasonable doubt that the error did not contribute to the verdict. *Krutsinger I*, 121 P.3d at 321 (citing *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

The *Krutsinger I* division also noted that if the error is not of constitutional dimension, review is conducted under the ordinary harmless error standard. *See* CRE 103(a).

Relying on *Richmond v. Embry*, 122 F.3d 866, 872 (10th Cir. 1997), the *Krutsinger I* division held that, to show that he or she was unconstitutionally denied the right to present relevant evidence, a defendant must show in part that he or she was denied fundamental fairness, such that the act complained of necessarily prevented the defendant from having a fair trial. More particularly, the *Krutsinger I* division noted that in making this assessment the court must consider the materiality of the excluded evidence.

Specifically, *Krutsinger I* held that "'materiality,' as used in this context, means that the evidence would have affected the outcome of the trial. In other words, evidence is material if it would have created a reasonable doubt that did not exist without that evidence." 121 P.3d at 322. The *Krutsinger I* division also drew on the supreme court's guidance in *People v. Melendez*, 102 P.3d 315 (Colo. 2004), in which the court stated that the right to present defense evidence is not absolute, and that a defendant must make a plausible showing of how certain testimony would have been "both material and favorable to his defense." 102 P.3d at 320 (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S.Ct. 3440, 3446, 73 L.Ed.2d 1193 (1982)). Additionally, *Krutsinger I* quoted from *Melendez* that "cumulative evidence that may corroborate the defendant's own statement should ordinarily be admitted." 121 P.3d at 322 (quoting *Melendez*, 102 P.3d at 320).

Further elaborating on the application of these standards of review, the *Krutsinger I* division stated that if the trial court determined that the improperly excluded evidence would have affected the outcome of the case, it must order a new trial. However, if the trial court determined that the error was not of constitutional dimension because the excluded evidence was not material and favorable, it should then determine whether the error was harmless under the ordinary harmless error standard.

Applying these standards of review, the trial court on remand concluded that the exclusion of

Howard's testimony was not an error of constitutional dimension and that the error was harmless under the ordinary harmless error standard.

II. Exclusion of Howard's Testimony

Defendant first contends the trial court erred when it concluded on remand that the exclusion of Howard's testimony was harmless error. Additionally, defendant contends the trial court erred when it only considered two of the four inconsistencies in the victim's testimony, which Howard's testimony would have revealed. We are not persuaded.

On remand, the trial court held an evidentiary hearing at which Howard testified. Although the victim met with Howard for four sessions – October 31 and November 11, 14, and 21, 2002 – Howard only had notes from the October 31 and November 14 sessions and admitted that she did not have an independent recollection of what occurred during any of the sessions. The notes from these two sessions were admitted into evidence at the remand hearing. The court also admitted, at the prosecutor's request, a detailed memorandum defendant's investigator had prepared before trial based on an interview with Howard.

Howard testified that, at the October 31 session, the victim described her relationships with her family in Washington, her mother, and her stepfather. The victim additionally told Howard about her grandmother's death, her stepfather's sexually abusing her,

how the abuse began at age four to five when her mother started dating her stepfather, and how the abuse ended when she was in the fourth grade.

Howard also testified that she did not report to the police the victim's accusations against defendant made during the first counseling session because Howard viewed the victim's account as incomplete. Howard also testified that she did not tell the victim that the reporting requirement could be avoided as long as the victim did not name her abuser. Howard explained that she would not make such a statement, because it would circumvent the mandatory reporting requirement. *See* § 19-3-304, C.R.S. 2007.

In its order on remand, the trial court addressed only two points from Howard's testimony – whether the alleged abuse ended when the victim was in the fourth grade or the sixth grade and whether Howard had suggested to the victim that she would not have to report any allegations of sexual abuse as long as the victim did not identify her abuser.

With respect to the constitutional error analysis, the trial court found that the apparent inconsistency concerning when the abuse ended was not material because the issue was already before the jury – based upon cross-examination of the victim and defense counsel's arguments – and the issue would not have raised a reasonable doubt in the jurors' minds had Howard testified. The trial court additionally found that the apparently inconsistent testimony of Howard and the victim concerning what Howard told the

victim about the mandatory reporting law was already in evidence before the jury in the context of the school counselor's testimony and, therefore, was not material evidence that would have affected the outcome of the case because it was cumulative.

Even if we assume the trial court erred in not evaluating all four inconsistencies in the victim's testimony asserted by defendant, our independent review of these inconsistencies leads us to conclude there was no reversible error.

A. Assertion of Four Reasonable Doubts About the Victim's Credibility

Defendant contends that the exclusion of Howard's testimony at trial constituted constitutional error because it would have created four reasonable doubts about the victim's credibility. Defendant maintains that Howard's testimony would have contradicted the victim's testimony about when the alleged abuse began and about when it ended. In addition, defendant asserts that Howard's testimony would have contradicted the victim's testimony that Howard would not be required to report any alleged abuse as long as the victim did not identify her abuser. Finally, defendant contends that Howard's testimony would have shown that the victim made up her allegations against defendant to compel her mother to prove her love for the victim by choosing between the victim and defendant.

We will assume for purposes of this analysis that the trial court should have evaluated all four instances relied on by defendant in support of his contention that the exclusion of Howard's testimony was of constitutional dimension.

B. Constitutional Error Analysis

We agree with defendant that Howard's testimony, had it been admitted, would have been favorable to him. However, we cannot conclude that Howard's testimony would have been material – that it would have created a reasonable doubt that did not exist without that evidence. *See Krutsinger I*, 121 P.3d at 322.

First, the inconsistencies that would have been highlighted by Howard's testimony did not go to the heart of whether the victim was abused. Rather, three of the inconsistencies – when the abuse began, when the abuse ended, and what Howard told the victim concerning the mandatory reporting law – concerned matters tangential to whether the abuse occurred.

These inconsistencies must be assessed in light of defendant's attack on the victim's credibility at trial. Defendant's counsel highlighted numerous inconsistencies in the victim's testimony and offered various possible motives for the victim to lie, including a strained relationship with her mother.

Specifically, during closing arguments, defendant's counsel outlined the following inconsistencies

in the victim's testimony: (1) the victim told the police and the forensic interviewer that defendant wore sweat pants when he abused her, but, at trial, she testified that he sometimes wore a business suit; (2) the victim gave the police details about the last incident of abuse, but did not give the forensic interviewer any information about the last incident of abuse, even when prompted; (3) the victim told the police that, during the abuse, defendant ejaculated, but she did not provide the forensic interviewer with such information, even when prompted; and (4) the victim testified that she told a friend about the abuse, but her friend testified that she did not remember such a conversation.

Additionally, defendant's attorney asked the jury to consider why the victim did not tell any of her teachers, her father, or her grandmother about the abuse and waited so long to tell her counselors and mother.

Thus, the inconsistencies that would have been highlighted by Howard's testimony were few compared to these numerous inconsistencies. Even though the jury was presented with ample evidence casting doubt on the victim's credibility, it still concluded that defendant was guilty.

Further, with respect to the end of the period of abuse, Howard acknowledged on remand that her notes for the November 14 counseling session stated that the abuse stopped when the victim was in the

sixth grade. This statement was consistent with the victim's trial testimony.

Consequently, because the inconsistencies not presented at trial do not go to the heart of whether the abuse occurred and are few in number compared to the significant amount of evidence unfavorable to the victim's credibility, we conclude that the inconsistent statements were not material; they would not have created a reasonable doubt as to defendant's guilt in the jurors' minds.

Additionally, even if we assume the trial court erred in precluding statements the victim made to Howard concerning her relationship with her mother, we conclude that the error was not of constitutional dimension.

Although defendant's attorney did not discuss the victim's possible motives for lying about the sexual abuse during closing arguments, defendant highlighted numerous motives for the victim to lie, including a strained relationship between the victim and her mother. None of these motives convinced the jury that defendant was innocent. Because testimony was introduced concerning the victim's strained relationship with her mother, the introduction of Howard's testimony would not likely have created a reasonable doubt that did not already exist.

Consequently, we conclude that, even if the trial court erred in precluding testimony concerning the victim's relationship with her mother, the error was not of constitutional dimension.

C. Harmless Error Analysis

Defendant's arguments focus on establishing that the exclusion of Howard's testimony was constitutional error. However, because we have concluded that the error was not of constitutional dimension, we now consider whether the error was reversible under the ordinary harmless error standard of review.

When a party objects to a trial court's erroneous evidentiary ruling, that ruling will be reviewed for harmless error. *Medina v. People*, 114 P.3d 845, 857 (Colo. 2005). When the evidence is considered as a whole, the error is reversible if it substantially influenced the verdict or impaired the fairness of the trial. *See id.*

As noted, Howard's testimony, if admitted, would have revealed additional inconsistent statements by the victim concerning when the abuse began, when the abuse ended, and what Howard told the victim about mandatory reporting requirements. Howard's testimony would have also corroborated the evidence that the victim's relationship with her mother was strained.

Also, as noted, the inconsistencies that would have been revealed by Howard's testimony did not go to the heart of whether defendant abused the victim. The inconsistencies revealed by Howard's testimony would have been cumulative to the significant number of inconsistencies already revealed throughout the trial. Moreover, defendant's attorney was

permitted to thoroughly cross-examine the prosecution's witnesses.

We conclude that the trial court's error in precluding Howard's testimony concerning inconsistent statements by the victim did not substantially influence the verdict and did not impair the fairness of the trial. Consequently, the error is harmless and not reversible.

With respect to the exclusion of Howard's testimony concerning the victim's statements about her strained relationship with her mother, this evidence would have been cumulative, and defendant's counsel was permitted to ask the victim about the relationship on cross-examination. Furthermore, defendant's counsel presented significant evidence concerning the victim's motive to lie. We conclude that the trial court's error in precluding Howard's testimony concerning such statements by the victim did not substantially influence the verdict and did not impair the fairness of the trial. Accordingly, the error is harmless and not reversible.

III. Prosecutorial Misconduct

Defendant contends that reversal is required because the prosecutor made three sets of comments during rebuttal closing argument that improperly bolstered the victim's credibility in a case that turned on her credibility. In response, the People contend that we should not address this contention under the

law of the case doctrine because it was addressed in *Krutsinger I*. We agree with the People.

The doctrine of the law of the case protects parties from having to relitigate settled issues. *Buckley Powder Co. v. State*, 70 P.3d 547, 557 (Colo. App. 2002). Under this doctrine, preclusive effect is given to decisions involving the same parties in the same case. *S.O.V. v. People in Interest of M.C.*, 914 P.2d 355 (Colo. 1996). The pronouncement of an appellate court on an issue becomes the law of the case and is binding in subsequent appeals involving the same case. *People v. Robbins*, 87 P.3d 120, 122 (Colo. App. 2003) (citing *People v. Roybal*, 672 P.2d 1003, 1005-06 (Colo. 1983)), *aff'd*, 107 P.3d 384 (Colo. 2005).

Nevertheless, the law of the case doctrine applies only to issues considered and actually decided in a prior appeal; it does not apply to issues that were not addressed. *See Hegler v. Borg*, 50 F.3d 1472, 1475 (9th Cir. 1995); *People in Interest of Garner v. Garner*, 33 P.3d 1239, 1241 (Colo. App. 2001) (division considering merits reconsidered decision of motions division in part because additional issues presented to division).

Defendant acknowledges that the *Krutsinger I* division addressed two of the alleged instances of prosecutorial misconduct, concluding that neither was reversible under a plain error standard of review. *See Wilson v. People*, 743 P.2d 415 (Colo. 1987). First, the *Krutsinger I* division found that the prosecutor

improperly suggested that defendant had not talked with the school guidance counselor. Second, the *Krutsinger I* division held that the prosecutor's references to the "pit of hell" and use of the word "diabolical" were rhetorical flourishes rather than an invocation of the victim's religious beliefs and, therefore, were not improper.

We abide by the conclusions of the *Krutsinger I* division concerning these two alleged incidents of prosecutorial misconduct. Under the law of the case doctrine, we will not revisit them, except in considering whether all three alleged instances of prosecutorial misconduct resulted in cumulative plain error.

In *Krutsinger I*, the division also rejected defendant's contention that in closing argument, the prosecution improperly appealed to the sympathies of the jury, denigrated defendant's theory of defense, and bolstered the victim's credibility. However, contrary to defendant's assertion, the *Krutsinger I* division addressed his previous contention that the prosecutor erred in stating that defendant was using the same defense that other defendants always use in child sex assault cases. Indeed, in *Krutsinger I*, 121 P.3d at 324, the division quoted part of the closing argument that defendant now asserts was not addressed.

After quoting that statement and other statements by the prosecutor regarding the inconsistencies of the victim, the *Krutsinger I* division concluded, "In

reading the arguments as a whole, we conclude that the prosecutor's comments responded to defense counsel's attacks on the victim's credibility and, therefore, did not denigrate defendant's theory of defense." *Id.* The *Krutsinger I* division also concluded that the prosecutor did not improperly bolster the victim's credibility in making the statements defendant now asserts were not addressed.

Accordingly, we need not revisit this contention based on the law of the case doctrine.

To the extent that the division in *Krutsinger I* did not specifically address whether the three sets of statements during the prosecutor's rebuttal closing argument constituted cumulative plain error, we do so now and reject defendant's contention. Having concluded that two of the three challenged statements were proper and only one was improper but not plain error, we necessarily conclude that there was not cumulative error.

IV. Correction of the Mittimus

Defendant contends that the trial court on remand did not correct the mittimus as directed by *Krutsinger I*, and that the mittimus still must be corrected. The People agree that the mittimus must be corrected, and so do we.

As noted in *Krutsinger I*, the jury convicted defendant of count 19, and the court entered

judgment on that count, even though the charging document does not contain a count 19.

Accordingly, the judgment is affirmed, and the case is remanded for correction of the mittimus.

JUDGE ROY and JUDGE STERNBERG concur.

DISTRICT COURT, DOUGLAS COUNTY, COLORADO Court Address: 4000 Justice Way Castle Rock, CO 80109-7546	COURT USE ONLY
Plaintiff: THE PEOPLE OF THE STATE OF COLORADO Defendant: CHARLES KRUTSINGER	Case Number: 02CR674 Ctrm.: Div. 6
ORDER	

THIS COURT, having conducted the trial in this matter, reviewed the Court of Appeals Mandate and having conducted a hearing pursuant to that Mandate, hereby issues the following Order:

On August 25, 2003 a jury in Douglas County convicted the Defendant of 30 counts of various sexual offenses, including aggravated incest, sexual assault on a child by one in a position of trust, sexual assault on a child and sexual assault on a child – pattern of abuse. On December 4, 2003 the Defendant was sentenced to a total of 10 years to the Department of Corrections. An appeal of this conviction then ensued.

On September 30, 2005 the Court of Appeals remanded this matter back to the trial court. The Court of Appeals had concluded that it was error for

this Court to have excluded the testimony of Dr. Patricia Howard, a therapist who treated the victim, [S.M.], See *People v. Krutsinger*, 121 P.3d 318 (Colo. App. 2005). The Court of Appeals directed this Court to allow Dr. Howard to testify regarding her conversations with the victim and then determine, whether in light of this evidence and taking into consideration the evidence introduced at trial, whether the exclusion of Dr. Howard's testimony was an error of constitutional dimension. If the Court concluded that it was not an error of constitutional dimensions the Court was to then determine whether the error was harmless under the ordinary harmless error standard.

Therefore, this Court must determine whether the testimony of Dr. Howard would have been material and favorable to the Defendant's case and would have affected the outcome of the case. If the Court so finds it must direct that a new trial take place. If the Court finds that the error was not of a constitutional dimension, the Court must then determine whether the error was harmless under the ordinary harmless error standard.

The Court finds that the Defendant has FAILED to establish that the exclusion of Dr. Howard's testimony was an error of constitutional dimensions. The Court further FINDS that this error was harmless under the ordinary harmless error standard.

At the hearing in which Dr. Howard testified the Court permitted expanded questioning of Dr. Howard

concerning her contacts with [S.M.]. However, it is important to for this Court to focus on the evidence that would have been *admitted* at trial. Conversations between the victim and Dr. Howard are not rendered admissible simply because they occurred. Instead these statements must be admissible under some exception to the hearsay rule or for impeachment purposes. The Court must determine whether this admissible evidence which the Court is material and favorable to the Defendant. In other words, would the admission of this evidence, considered with all of the other evidence, created [sic] a reasonable doubt in favor of the Defendant? If so, a new trial is mandated. If not, the Court must then determine whether the error is harmless.

The burden is on the Defendant to establish that the testimony of Dr. Howard would have been material and favorable to the Defendant. See *People v. Melendez*, 102 P.3d 315. Materiality means whether this evidence could have created a reasonable doubt that did not exist without that evidence. See *Richmond v. Embry*, 122 F.3d 866, (10th Cir. 1997) and *Krutsinger*.

In order to address the admissibility question, the Court first looks to Section 13-25-129 C.R.S. In this case the People sought the admissibility of statements of the victim pursuant to this statute, including a video taped interview at Sungate, a facility utilized by law enforcement in Douglas County to conduct interviews with children. The People filed a notice of their intent to introduce these statements at

trial and the Court conducted a hearing in advance of trial. At that hearing the Court heard testimony from Michael Lantz, a school counselor, Sgt. Jeffrey Egnor and Roberta Krutsinger, the victim's mother and viewed, in camera, the video tape of the interview with the victim at Sungate. At the conclusion of the hearing the Court made specific findings with respect to Section 13-25-129 C.R.S. and admitted these statements.

The Defendant did not provide notice in advance of trial that it wished to introduce at trial any hearsay statements of the child at trial. Dr. Howard met with the victim on October 31, November 11, November 14 and November 21, 2002. These sessions lasted for approximately 45 minutes. While the Court of Appeals found that the Defendant could not interview Dr. Howard before trial, this is distinctly in contradiction with Exhibit 1 offered into evidence at the hearing in this case. This Court finds that the Defendant did, in fact, interview Dr. Howard on February 27, 2003, six months prior to trial. This interview, by a private investigator retained on behalf of counsel for the Defendant, resulted in a 7 page report by the investigator. It appears from the report that the interview was also tape-recorded by the investigator. There were also notes provided by Dr. Howard to the investigator from two of the four interview sessions. Dr. Howard could not and has not found her notes from the other 2 sessions and was unable to recall those interviews during her testimony in court. However, this inability to recall today

what occurred in two of the four interviews, given the extensive interview with Dr. Howard prior to trial, does not give rise to an error of constitutional dimensions. This is particularly so given the limited nature of the testimony from the victim concerning her contacts with Dr. Howard. Furthermore, it is clear to the Court that the Defendant had the opportunity to interview Dr. Howard in advance of trial and that no notice of any attempt to seek the admissibility of child hearsay statements of the victim was filed by the Defendant. Therefore, section 13-25-129 C.R.S. cannot serve as a basis for the admissibility of any statements of the victim to Dr. Howard.

The Court then turns to the actual trial testimony. The prosecutor asked the victim, at volume 4 p. 91-92, if she had talked to Dr. Howard about her sexual assault allegations against the Defendant. She indicated that she had made a statement about the abuse and that she thought she knew who it was and that she thought it was the Defendant. When asked why she was proceeding in this manner the victim testified that she didn't want to come right out and tell her right off the bat. She also said that Dr. Howard told her that if she told her who it was then Dr. Howard would have to report the abuse. The victim testified that she wasn't ready for this to happen. The Court finds that Dr. Howard could have been questioned in front of the jury about these statements made by the victim about her contact with Dr. Howard.

On cross-examination counsel for the Defendant asked the victim questions about Dr. Howard at volume 5 pages 62-66 and 94-95. Counsel asked the victim if she had told Dr. Howard that the abuse went on until the fourth grade. The victim responded that she thought she said that it went on until the sixth grade. The victim was then shown some notes from Dr. Howard that indicated that she had said it went on until the fourth grade. When asked if Dr. Howard was wrong, the victim said she didn't know. (Vol.5 p. 64)

The victim was also asked about conclusively stating to Dr. Howard on October 31, 2002 that the Defendant had molested her. She said that she told Dr. Howard that she was almost sure but didn't specifically identify the Defendant. She explained that the reason she didn't name the Defendant was that Dr. Howard told her that Dr. Howard would have to take immediate action if she named anybody. (Vol. 5 p. 64-65).

The victim was asked why she stopped going to see Dr. Howard and she said volleyball, lack of resources and because the victim believed that Dr. Howard wasn't helping her. (Vol. 5 p. 66). The victim also testified that, if her grandmother were still alive and had learned of the abuse, the grandmother would have come to Colorado and taken her back to the state of Washington. (Vol. 5 p. 94-95).

The Court-has also reviewed Dr. Howard's testimony at the post-trial hearing. She confirms that the

victim discussed abuse and that the victim thought it was the Defendant. In exhibit 1 Dr. Howard refers to the victim as being vague. In her testimony at the post-trial hearing Dr. Howard testified that the victim's statement lacked sufficient detail. Dr. Howard testified that she didn't report it after the first interview on October 31, 2002 because of the lack of details. Dr. Howard denied telling the victim that if the report was vague Dr. Howard wouldn't have to report it but if the victim named someone that Dr. Howard would have to report it.

The Defendant has also argued that it was error for the Court to have excluded Dr. Howard because the Defendant, in opening statement, indicated to the jury that she would testify. However, it is axiomatic that opening statements are not evidence and the jury is instructed not to consider them as evidence. The indication by Defendant's counsel concerning calling Dr. Howard to testify was brief in nature and not detailed. The fact that counsel indicated in opening statement that Dr. Howard would testify and then the Court precluded her testimony is not evidence and the Court finds this cannot give rise to an error of constitutional dimensions. It is only the admissible evidence the Court must consider in determining whether the preclusion of Dr. Howard was an error of constitutional dimensions.

The Defendant has FAILED to establish that the exclusion of Dr. Howard's testimony was of constitutional dimension. In assessing this the Court looks to the testimony of the victim at trial and the

testimony of Dr. Howard at the post-trial hearing. The 2 most distinguishable disputes between their testimony is that 1) the victim thought that she told Dr. Howard that the abuse lasted until the sixth grade while Dr. Howard's notes refer to the fourth grade and 2) the victim testified that Dr. Howard told her that Dr. Howard wouldn't have to report a vague statement by the victim, but if the victim named the perpetrator then Dr. Howard would have to file a report. Dr. Howard denies making this statement to the victim.

The Court finds that with respect to the issue of difference in grades, the victim was cross-examined on this point and shown a copy of Dr. Howard's notes that contradicted her. This issue was before the jury. The testimony of Dr. Howard at trial would have confirmed what her notes said. The victim in this case was extensively cross-examined by Defendant's counsel. Discrepancies and inconsistencies in her testimony and previous statements were raised by counsel and addressed by both counsel in their statements to the jury. This Court cannot find that the testimony of Dr. Howard on the grade difference was a material fact that would have raised a reasonable doubt in this case.

With respect to the reporting discrepancy between the testimony of the victim and Dr. Howard, the Court notes that this very same issue was raised with respect to Mr. Michael Lantz, the high school counselor to whom the victim first reported on November 8, 2002. The victim testified that Mr. Lantz

told her that if she told him who it was that abused her that he would be obligated to report it. (Vol. 5 p. 65). Mr. Lantz testified that he would never tell a student reporting a sexual assault that Mr. Lantz did not have to report the assault if the student didn't provide a name of the perpetrator. (Vol 5. 197-198). This issue of the victim believing that a counselor/ therapist didn't have to report if she didn't provide a name, was already in evidence before the jury. The victim explained why she delayed in reporting these assaults and why she was reluctant to name the Defendant. The jury heard from Robert Krutsinger, the victim's mother and then wife of the defendant, about the victim's statements to her. The jury heard from Mr. Lantz about the fact that the victim had, previous to November 8, 2002, indicated that she had something she wanted to tell him. He talked about adolescents typically wanting to know if they can trust a counselor before they reveal information to him. He also observed her demeanor as she talked to him on November 8, 2002 and how it differed from her usual appearance. He described her as being fairly stoic and under control of her emotions. (Vol. 5 p. 184) The jury had the ability to assess Mr. Lantz and all of the witnesses who testified, including the victim and the Defendant. The jury had the ability, better than anyone else, to assess the credibility of these two individuals. Given the totality of the evidence in this case, this Court cannot find that the discrepancy in reporting as contained in the testimony of the victim and Dr. Howard would have been

material evidence that would have affected the outcome of this case.

Viewing all of the evidence admitted at trial and the testimony of Dr. Howard that would have been admissible at trial, this Court cannot find that all such evidence, viewed collectively, would have been material evidence favorable to the Defendant that would have affected the outcome of this case. The Defendant has failed to establish that the exclusion of Dr. Howard's testimony was of a constitutional dimension. The Court finds that the discrepancies between the victim and Dr. Howard would not have created a reasonable doubt that would have altered the verdicts in this case.

Applying ordinary harmless error standard the Court finds that the exclusion of Dr. Howard's testimony was, in fact, harmless. The issue of the discrepancy between the grades was before the jury and the reporting discrepancies were also raised with respect to the testimony of Michael Lantz. Even if the reporting discrepancies had not been raised with Mr. Lantz the Court cannot find that this discrepancy between the victim and Dr. Howard was anything other than harmless error.

The Defendant has filed a Motion for Reduction of Sentence. Before the Court takes any action on this request the Court will require the Defendant to specify the following: 1) the specific counts on which erroneous sentences were given and the basis for the position that these sentences are erroneous; 2) the

specific counts to which the Defendant is requesting reduction pursuant to Section 18-1.3-406(1)(a) C.R.S.; 3) the specific corrections the Defendant is seeking to the mittimus. This shall be done within 50 days of this Order or within 50 days of any mandate issued by an appellate court.

Dated and signed this 23rd day of February, 2006.

BY THE COURT:

/s/ Paul A. King
PAUL A. KING
District Court Judge

121 P.3d 318

The PEOPLE of the State of Colorado,
Plaintiff-Appellee,
v.
Charles M. KRUTSINGER,
Defendant-Appellant.

No. 04CA0286.

Colorado Court of Appeals,
Div. II.

Aug. 11, 2005.

John W. Suthers, Attorney General, Karen E. Lorenz, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee.

Jean E. Dubofsky, P.C., Jean E. Dubofsky, Boulder, Colorado; Craig L. Truman, P.C., Craig L. Truman, Denver, Colorado; Burke & Neuwirth, P.C., Dean Neuwirth, Denver, Colorado, for Defendant-Appellant.

TAUBMAN, J.

Defendant, Charles M. Krutsinger, appeals the judgment of conviction entered on a jury verdict finding him guilty of ten counts each of sexual assault on a child, sexual assault on a child by one in a position of trust, and aggravated incest. We remand for further proceedings and correction of the mittimus.

I. Background

Defendant and the victim's mother were married in 1992 when the victim was approximately six years old. In 1993, shortly before the victim started the second grade, defendant, her mother, and the victim moved from Houston to Denver.

In August 2002, the victim informed her mother that she had been sexually abused, but she did not say by whom. At the end of October 2002, the victim had the first of four counseling sessions with Dr. Patricia Howard, a psychologist. During that session, the victim told Howard that defendant might have molested her when she was younger. In early November, the victim told her high school guidance counselor that defendant had sexually molested her. The counselor informed the police and the mother about the victim's allegation.

Defendant was subsequently charged with ten counts each of sexual assault on a child, sexual assault on a child by one in a position of trust, and aggravated incest.

At trial, the victim testified about defendant's alleged abuse and her counseling sessions with Howard. The victim's mother, her school counselor, a school resource officer, and a sheriff's department investigator testified and corroborated the victim's allegations of sexual abuse. The jury was also shown a videotape of an interview with the victim regarding the abuse, which was conducted by a forensic interviewer from a child advocacy center.

After the prosecution presented its case, defendant sought to admit Howard as a witness and made an offer of proof regarding Howard's proposed testimony. The trial court denied defendant's request on the ground that the victim had neither consented to the admission of Howard's testimony nor waived her psychologist-patient privilege. Defendant testified on his own behalf and denied the victim's allegations.

The jury convicted defendant on all counts, and he was sentenced to ten years in DOC.

II. Exclusion of Howard's Testimony

Defendant contends, the prosecution concedes, and we agree that the trial court erred in excluding Howard's testimony.

Although the trial court based its exclusion on its finding that the victim did not waive her psychologist-patient privilege, the victim testified in detail regarding statements she made to Howard during the counseling sessions. Thus, we agree with both parties that she waived her psychologist-patient privilege. *See People v. Sisneros*, 55 P.3d 797 (Colo.2002) (patient may expressly or impliedly waive this privilege by testifying as to the substance of the treatment sessions).

III. Appropriate Standard for Review of Error

We must now decide on the appropriate standard for determining whether the trial court's error

warrants reversal of defendant's conviction. At our request, the parties have filed supplemental briefs on this issue.

The parties agree that, if the error is of constitutional dimension, the "constitutional harmless error" standard applies. Under this standard, the People would have the burden of showing beyond a reasonable doubt that the error did not contribute to the verdict. *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Griego v. People,* 19 P.3d 1, 8-9 (Colo.2001).

Similarly, the parties agree that, if the error is not of constitutional dimension, the review is conducted under the ordinary harmless error standard. *See* CRE 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected."); Crim. P. 52(a) ("Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."); C.A.R. 35(e) ("The appellate court shall disregard any error or defect not affecting the substantial rights of the parties."). Under this standard, reversal is not required if the reviewing court can say with fair assurance that, in light of the entire record, the error did not substantially influence the verdict or impair the fairness of the trial. *People v. Stewart,* 55 P.3d 107, 124 (Colo.2002) (citing *People v. Gaffney,* 769 P.2d 1081 (Colo.1989)).

The parties disagree, however, whether the trial court's error was of constitutional dimension.

Defendant contends that the error was of constitutional dimension because the ruling deprived him of the right to present witnesses, in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

The People argue that a defendant cannot premise a claim of constitutional error upon the mere fact that the trial court disallowed the testimony of a witness. They contend that the erroneous exclusion of testimony is of constitutional dimension only if the defendant shows that the excluded testimony was "favorable and material." They further contend that, because defendant has failed to make the necessary showing, the trial court's error should be reviewed simply for ordinary harmless error.

We agree with the analytical framework advanced by the People and agree that, under this framework, defendant has yet to establish that the trial court's error was of constitutional dimension. However, we further conclude that the case should be remanded so that the trial court can (1) allow Howard to testify regarding the conversations she had with the victim during the counseling sessions, (2) determine, in light of this evidence, whether the exclusion of Howard's testimony was an error of constitutional dimension, and (3) if the error was not of constitutional dimension, determine whether the error was harmless under the ordinary harmless error standard.

A. Standard for Materiality

A defendant's right to due process and compulsory process includes the right to present witnesses in his or her own defense. *Washington v. Texas,* 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

However, this right is not unlimited. In presenting such testimony, the defendant must comply with certain evidentiary and procedural rules which "assure both fairness and reliability in the ascertainment of guilt and innocence." *Richmond v. Embry,* 122 F.3d 866, 872 (10th Cir.1997) (quoting *Chambers v. Mississippi,* 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973)). "However, the state may not arbitrarily deny a defendant the ability to present testimony that is 'relevant and material, and . . . vital to the defense.'" *Richmond, supra,* 122 F.3d at 872 (quoting *United States v. Valenzuela-Bernal,* 458 U.S. 858, 867, 102 S.Ct. 3440, 3446, 73 L.Ed.2d 1193 (1982)).

In *Richmond,* the Tenth Circuit concluded that a defendant must satisfy two criteria to show that he or she was unconstitutionally denied the right to present relevant evidence: (1) the importance of the evidence to the defense outweighed the interests of the state in excluding the evidence, and (2) the defendant was denied fundamental fairness, such that the act complained of necessarily prevented the defendant from having a fair trial.

Here, we have already concluded that the trial court erroneously excluded defendant's proffered

evidence, and therefore, we need not consider the first criterion set forth in *Richmond*.

Under the second criterion, "It is the materiality of the excluded evidence to the presentation of the defense that determines whether a petitioner has been deprived of a fundamentally fair trial." *Richmond, supra,* 122 F.3d at 872 (quoting *Maes v. Thomas,* 46 F.3d 979, 987 (10th Cir.1995)). In this context, "materiality" does not mean that the evidence relates to a fact of consequence. *See, e.g., People v. Rath,* 44 P.3d 1033, n. 3 1038 (Colo.2002) (concept of materiality no longer has independent significance under the rules of evidence and is instead subsumed within the notion of logical relevance). Rather, "materiality," as used in this context, means that the evidence would have affected the outcome of the trial. In other words, evidence is material if it would have created a reasonable doubt that did not exist without that evidence. *Richmond, supra,* 122 F.3d at 872; *see also Valenzuela-Bernal, supra,* 458 U.S. at 868, 102 S.Ct. at 3447 (implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial) (quoting *United States v. Agurs,* 427 U.S. 97, 104, 96 S.Ct. 2392, 2398, 49 L.Ed.2d 342 (1976)).

In *People v. Melendez,* 102 P.3d 315 (Colo.2004), the Colorado Supreme Court applied this standard and cited *Valenzuela-Bernal* and *Richmond* with approval. In *Melendez,* the trial court precluded the testimony of a defense witness because the witness had violated a sequestration order. In considering

whether the trial court's exclusion of that evidence was reversible error, the supreme court stated:

> While fundamental, the right to present defense evidence is not absolute. *A defendant must "make some plausible showing of how [the] testimony would have been both material and favorable to his defense."* The evidence may be excluded if it is unnecessarily duplicative.
>
> Nevertheless, cumulative evidence that may corroborate the defendant's own statement should ordinarily be admitted. (Emphasis added.)

Melendez, supra, 102 P.3d at 320 (citations omitted; quoting *Valenzuela-Bernal, supra,* 458 U.S. at 867, 102 S.Ct. at 3446; alteration in original).

B. Materiality of Howard's Testimony

Normally, a defendant may argue the materiality of excluded evidence by making an offer of proof to the trial court. CRE 103(a)(2). *See also Valenzuela-Bernal, supra,* 458 U.S. at 874, 102 S.Ct. at 3450 ("courts should afford some leeway for the fact that the defendant necessarily proffers a description of the material evidence rather than the evidence itself").

Here, however, defendant was unable to make an offer of proof as to the materiality of Howard's testimony. Defendant could not interview Howard before trial because the substance of Howard's counseling sessions was protected by the psychologist-patient

privilege. Further, any subsequent attempt to interview Howard was effectively precluded by the trial court's erroneous ruling on the question of waiver.

Accordingly, we must remand the case for further proceedings at which time Howard shall testify, and the trial court shall determine whether her testimony would have been material and favorable to defendant's case. After hearing Howard's testimony, the trial court must determine whether the evidence, had it been admitted at trial, would have affected the outcome of the case.

This determination necessarily requires an evaluation of the entire record:

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. . . . This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

Valenzuela-Bernal, 458 U.S. at 868, 102 S.Ct. at 3447 (quoting *United States v. Agurs, supra,* 427 U.S. at 112-13, 96 S.Ct. at 2401-02).

C. Determination of Harmlessness

If the trial court determines that the improperly excluded evidence would have affected the outcome of the case, it must order a new trial. This is so because the defendant's showing that the excluded evidence was favorable and material would necessarily defeat any attempt by the People to show that the constitutional error was harmless beyond a reasonable doubt. *See Bernal v. People,* 44 P.3d 184 (Colo.2002) (ultimate burden if [sic] proof is on People to show that a constitutional error was harmless beyond a reasonable doubt). This is true for other constitutional errors that deprive the defense of favorable evidence. *See In re Sassounian,* 9 Cal.4th 535, 545 n. 7, 37 Cal.Rptr.2d 446, 887 P.2d 527, 533 (1995) (if the defendant shows that the prosecution failed to disclose evidence that was both favorable and material, he necessarily establishes that the error was not harmless beyond a reasonable doubt).

Conversely, if the trial court determines that the error was not of constitutional dimension because the excluded evidence was not material and favorable, it should then determine whether the error was harmless under the ordinary harmless error standard discussed above. As a practical matter, the review for harmlessness may be decided by reference to the findings and conclusions that informed the court's decision on the issue of materiality. Nevertheless, because the two legal standards are not necessarily coextensive, the trial court should determine whether its erroneous ruling affected defendant's substantial

rights. *See* CRE 103(a); Crim. P. 52(a); C.A.R. 35(e); *People v. Stewart, supra,* 55 P.3d at 124.

III. Prosecutorial Misconduct

Defendant contends that reversal is required because the prosecution made improper comments during its closing argument. We disagree.

Defendant did not object to the prosecutor's statements he now challenges on appeal, and therefore, we review the statements under a plain error standard. *See Wilson v. People,* 743 P.2d 415 (Colo.1987). Plain error is error that so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction. *People v. Salyer,* 80 P.3d 831 (Colo.App.2003); *People v. Petschow,* 119 P.3d 495, 2004 WL 2136945 (Colo.App. No. 01CA1684, Sept. 23, 2004) (plain error is obvious, substantial, and grave.)

Prosecutorial misconduct in closing arguments rises to the level of plain error only if it is "flagrantly, glaringly, or tremendously improper." *People v. Avila,* 944 P.2d 673, 676 (Colo.App.1997) (quoting *People v. Vialpando,* 804 P.2d 219, 224 (Colo.App.1990)). Claims of improper argument must be evaluated in the context of the argument as a whole and in light of the evidence before the jury. *See People v. Raehal,* 971 P.2d 256 (Colo.App.1998). The prosecution is afforded considerable latitude in replying to opposing counsel's arguments. *Vialpando, supra.* Moreover, a defendant's failure to object suggests, that at least at the

time the comment was made, "the live argument was not overly damaging." *Avila, supra,* 944 P.2d at 676.

Defendant contends that in the closing argument, the prosecution improperly appealed to the sympathies of the jury, denigrated defendant's theory of defense, and bolstered the victim's credibility. We disagree.

In defendant's closing argument, defense counsel repeatedly attacked the victim's credibility, suggesting that the victim lied in much of her testimony. At the end of defendant's closing argument, defense counsel stated:

> In the end, this case is about who[m] do you believe, for one person must be lying and one person must be telling the truth. . . . We're looking for you to see this case on the evidence. Hear the sympathetic appeal when [the prosecution] says, [t]his poor little kid. No wonder she's got it wrong. It's traumatizing. This poor little kid. No wonder she can't keep it straight, because it happened so many times. This poor little kid. Hear the sympathetic appeal. It will be coming here in a minute.

Immediately following those statements, the prosecutor, in his rebuttal closing, stated:

> She's inconsistent. You can't believe her. All of those inconsistencies. My God, how can anybody believe that? You know what the great thing about that defense is? It works in every child sex assault case, every single one

> where there [are] repeat allegations of molestation, because they are always inconsistent.

Shortly thereafter, the prosecutor continued, stating:

> If this girl is lying to you, think about what a lie this is. This isn't just some cute little lie. Either this girl has told you the truth, opened her heart up to you and told you what happened to her when she was a little girl, or this is the most diabolical, despicable plot from the pit of hell to accuse a man of something like this if he didn't do it. She knows the consequences of that. Is she really that girl? Is she that evil girl?

In reading the arguments as a whole, we conclude that the prosecutor's comments responded to defense counsel's attacks on the victim's credibility and, therefore, did not denigrate defendant's theory of defense. *See Vialpando, supra.*

Furthermore, where the case turns on which witness the jury believes, each side is entitled to argue that its witnesses testified truthfully while the witnesses for the opposing side testified falsely. *People v. Salter,* 717 P.2d 976 (Colo.App.1985). Therefore, the prosecutor did not improperly bolster the victim's credibility.

Defendant next contends that the prosecutor's comment regarding the "pit of hell" and use of the word "diabolical" forced religious jurors to contemplate

whether they themselves would damn the victim to hell if they did not render a verdict which validated her accusations. Defendant contends this ostensible use of religion improperly appealed to the sympathies of the jury.

Defendant cites § 13-90-110, C.R.S.2004, and CRE 610 to establish that religious beliefs are inadmissible at trial. However, both the statute and the rule refer to the inadmissibility of references to or evidence of a witness's religious beliefs. The prosecutor is not a witness, and his or her statements made in closing argument are not evidence. *See People v. Duncan,* 109 P.3d 1044 (Colo.App.2004).

The prosecutor argues that his use of the phrase "pit of hell" was a reasonable response to defense counsel's closing argument. Even if we were to assume this response was not reasonable, we conclude that defendant's religion-based argument is too tenuous to warrant reversal. The terms "pit of hell" and "diabolical" appear to have been rhetorical flourishes, rather than an invocation of the victim's religious beliefs. Therefore, we are not persuaded that it was so flagrantly, glaringly, or tremendously improper as to warrant reversal under a plain error standard. *See Vialpando, supra; see also People v. Harris,* 914 P.2d 425 (Colo.App.1995) (prosecutor's flamboyant demonstrative use of knife that was an exhibit at trial was a response to defendant's arguments and not so inflammatory as to warrant reversal); *Lee v. State,* 148 So. 627, 627 (Miss.1933) (prosecutor's comment, "It would be better for this County if God would send an

earthquake and swallow up Pistol Ridge and send it to the bottom pits of Hell," did not warrant reversal because it did not influence the jury).

Last, defendant contends that the prosecutor erred by calling him a liar. In a pretrial hearing, the school counselor testified that defendant had talked to him in October 2002 because defendant was concerned about the victim. At trial, defendant testified regarding this conversation, but when the counselor testified, he was not asked whether he and defendant had discussed the victim's well-being.

In his closing argument, the prosecutor stated in part:

> Is there any evidence [regarding defendant's conversation with the counselor] besides what the defendant said? Did you notice that [the counselor] sat right on that witness stand and no one asked him about whether the defendant came to see him? Think to yourself why this might be.

We conclude that this comment was improper because the prosecutor was aware that the counselor had testified to such a conversation with defendant in the pretrial hearing. *See DeLuzio v. People*, 177 Colo. 389, 494 P.2d 589 (1972) (prosecutor may not knowingly misrepresent facts to the jury). However, in the context of the entire argument and in light of the other evidence before the jury, we conclude that it was not so flagrantly, glaringly, or tremendously improper as to warrant reversal.

IV. Correction of the Mittimus

As noted by defendant in his opening brief, the charging document does not contain a count nineteen. Nevertheless, the jury convicted defendant of count nineteen, and the court entered judgment on that count. The prosecution does not dispute this contention, and therefore, the mittimus should be corrected on remand, if defendant's conviction stands affirmed. *See* Crim. P. 36; *see also People v. Turner,* 730 P.2d 333 (Colo.App.1986) (clerical error in judgment of conviction, sentence, and mittimus is proper grounds for remand to correct the error). We note that the correction does not affect the length of defendant's incarceration period because the sentences on all counts were to be served concurrently.

V. Remand

We remand for a hearing to obtain Howard's testimony. On remand, if the trial court determines that the testimony was material to defendant's case, the court must further determine whether the error in excluding that evidence was harmless beyond a reasonable doubt. *See Melendez, supra.* If the trial court determines that the evidence was not material and favorable to defendant's case, then the trial court must determine whether the error in excluding that evidence was harmless error, such that it affected the substantial rights of the defendant. *See King v. People,* 785 P.2d 596 (Colo.1990).

If the trial court determines that the exclusion of the evidence was reversible error, defendant's conviction stands reversed, subject to direct appeal by the People pursuant to § 16-12-102(1), C.R.S.2004. If the trial court determines that the exclusion of the evidence was not reversible error, defendant's conviction stands affirmed, subject to a direct appeal by defendant, and the court should correct the mittimus.

The case is remanded for further proceedings consistent with this opinion.

Judge ROTHENBERG and Judge RUSSEL concur.

Colorado Supreme Court 2 East 14th Ave., Fourth Floor Denver, CO 80203	
Certiorari to the Court of Appeals, 2006CA532 District Court, Douglas County, 2002CR674	
Petitioner: Charles M. Krutsinger, v. **Respondent:** The People of the State of Colorado.	Supreme Court Case No: 2008SC378
ORDER OF COURT	

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, NOVEMBER 23, 2009.

[SEAL]

[Certificate Of Service Omitted In Printing]